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Supreme Court, U.S.
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No. .....

In The

Supreme Court of the United States

October Term, 1986

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KENNETH WOOD, et al.,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, et al.,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. In order to vacate an arbitration award, what, if anything, must an employee-plaintiff in a hybrid 301 action prove in addition to a breach of duty by his or her union of its duty of fair representation at that arbitration? Is it sufficient to prove, as did the plaintiffs in this case, that "the arbitration process was seriously flawed" and "the arbitration fundamentally malfunctioned in a way that denied the plaintiffs a fair and adequate hearing," or must there also be presented direct evidence that the union's breach "must have contributed to the arbitrator's making an erroneous decision"?

2. Is a union's breach of its duty of fair representation at an arbitration necessarily rendered harmless as a matter of law if the employee was represented by his or her own counsel?

3. In order to recover damages from a union which has been shown to have violated its duty of fair representation by not asserting its members' rights, must the employee-plaintiff establish by direct evidence that the employer would have yielded had the union properly represented its members?*

4. If employee-plaintiffs prove that their union failed to adequately represent them, are they entitled to recover from the union the expenses incurred in seeking a fair resolution of their claim, even though they do not prevail against the employer?**

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* Note: Petitioners reserve the right to argue Question 3 in the event certiorari is granted on any of the above questions, but do not include Question 3 among the reasons for the granting of certiorari.

** Although deserving of review by this Court for the reasons stated in this petition, Question 4 need be resolved only if both Questions 1 and 2 are decided against petitioners.

5. Are employee-plaintiffs in a hybrid 301 entitled to a jury trial on their claims against their union and their employer?

6. Can a succeeding employer be obligated to honor any of the substantive provisions of a collective bargaining agreement with its predecessor, even though it has not assumed that agreement, in any situation other than a merger where the predecessor disappears into the successor?

LIST OF PARTIES

Petitioners

There are 38 named petitioners. They represent themselves and all other persons employed by the Kroger Company as of October 16, 1980, at its warehouse in Kentwood, Michigan, a total of 199 persons.* The named plaintiffs are: Kenneth Wood; Jeffrey Fansler; Charles Bohner; Harry Hight; Gerald Jordan; Fred Stam; Clarence Plooster; Keith Bailey; Don Corey; Jack Peterson; James Roseboom; Edmund Lozon, Jr.; Forrester Banktson; Gaylord Feasal; Kathy Jordan; Wayne Buskard; Richard Morey; James Otten; Roger Staeven; Robert Minnema; Roger Raymor; Robert Noble; William Ward; Joseph Marsiglia; Richard Knauss; Donald Moore; John Anderson; Robert Krueger; Rich Smith; Cecil Wyckoff; Richard Ford; Howard Weatherford; Neil Lindale; Howard Miller; Arthur Rypma; William Billings; Ed Eyk; and Robert Chettleburgh.

Respondents

There are three respondents. They are: The Kroger Company, an Ohio corporation; Hamady Brothers Food Markets, Inc., a Michigan corporation; and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 406, a labor organization representing employees in an industry affecting interstate commerce.

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* At one point, the District Court refused to certify the class. However, the Court granted a motion to reconsider and decided to withhold ruling on class certification until after the liability trial. Because of defendants' appeal, that motion has not been decided.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Kenneth Wood, and the several other petitioners identified at p. iii, *supra,* hereby petition this Honorable Court to issue to the United States Court of Appeals for the Sixth Circuit a writ of certiorari to review the judgment and opinion of that Court entered in the above-entitled proceeding on December 15, 1986, rehearing and rehearing en banc denied on January 30, 1987.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 807 F.2d 493, and is reprinted in the appendix, p. 65a. Reviewed in that opinion are four opinions by the United States District Court for the Western District of Michigan. Three of those opinions are reported: 593 F.Supp. 1011 (1983), reprinted in the appendix,

p. 3a; 593 F.Supp. 355 (1984), reprinted in appendix, p. 8a; and 603 F.Supp. 992 (1985), reprinted in appendix, p. 33a. The fourth opinion is not reported; it is reprinted in the appendix, p. 18a.

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JURISDICTION

The judgment of the Sixth Circuit Court of Appeals sought to be reviewed was entered on December 15, 1986. A timely petition for rehearing was denied on January 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATUTE INVOLVED

The federal statute pertinent to this case, although nothing herein turns on its terms, is 29 U.S.C. § 185. The text of said statute is, because of its length, set forth in the appendix, p. 2a.

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STATEMENT OF THE CASE

Plaintiffs were all employed, until 1980, by the Kroger Company at a warehouse it owned and operated in Kentwood, Michigan. Their employment was governed by a collective bargaining agreement between Kroger and Local 406 of the Teamsters Union, of which they were all members. The contract contained a successor-and-assigns clause. In October, 1980, Kroger turned over operation of the warehouse to Hamady Brothers Food Markets, Inc.

Plaintiffs filed suit in Kent County (Michigan) Circuit Court to enjoin transfer of the warehouse unless Kroger conditioned that transfer on Hamady's assumption of their labor contract. Kroger, Hamady, and Local 406 were named as defendants. Local 406 was alleged to have violated its duty of fair representation by failing to protect plaintiffs' seniority rights. Kroger was accused of a breach of contract for not honoring the successor-and-assigns clause. Hamady was alleged to be bound by the contract because of its "continuing relationship with Kroger." The case was removed to the United States District Court

for the Western District of Michigan because it stated claims under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. Prior to filing suit, plaintiffs had filed grievances against Kroger and Hamady. When those grievances were resolved against them, *Kroger Co.*, 78 Lab. Arb. Rep. 569 (1982), plaintiffs amended their complaint to assert that Local 406 had not fairly represented them in those proceedings.

After extensive discovery and numerous pre-trial proceedings,[1] the case went to trial. It lasted six weeks. Only the issue of liability was tried. The issue of damages was bifurcated for later resolution if liability was found. At the end of plaintiffs' proofs, the District Court dismissed the case against Hamady. The cases against Local 406 and Kroger were submitted to a jury. A special verdict was returned finding that Local 406 had violated its duty of fair representation, that that breach had "seriously undermine[d] the integrity of the arbitration process," and that Kroger had violated its contract with plaintiffs and their union. See 807 F.2d at 497; p. 72a. Judgment was entered for plaintiffs. Kroger and Local 406 filed motions for judgment notwithstanding the verdict and for a new trial. They were denied, 603 F.Supp. 992; p. 33a. Thereupon, Kroger and Local 406 asked the trial court to certify several issues for interlocutory appeal. Damages not yet having been assessed, the judgment was not final. Five issues were certified:

> 1. Whether the court properly ruled that plaintiff had a right to a jury trial in this case;

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[1] There were numerous discovery disputes which had to be resolved by the District Court. See, e.g., 101 F.R.D. 784 (1984). Several motions for summary judgment were heard and denied. A motion by Kroger and Hamady to strike plaintiffs' jury demand was denied, 565 F.Supp. 1011 (1983). As already noted elsewhere, class certification was denied and reconsideration granted. An effort by defendants to disqualify plaintiffs' counsel was rejected, 583 F.Supp. 1471 (1984). Severance of liability from damages was ordered, and various motions in limine were considered. See, e.g., 593 F.Supp. 355 (1984).

2. Whether, given the Court's determination that Hamady was not a successor under federal labor law, the jury could properly find a breach by the union of its duty of fair representation with respect to Hamady;

3. Whether there can be any recovery for Union conduct apart from the arbitration hearing regarding claims against Kroger or against Hamady;

4. Whether the jury was properly instructed regarding the standard that must be met by plaintiffs before the jury could find that the arbitrator's decision should be set aside; and

5. Whether the Court properly instructed the jury regarding the jury's interpretation of the Kroger-Local 406 contract. See 807 F.2d at 498; p. 73a.

Plaintiffs asked that the judgment in favor of Hamady be modified to include a F.R.C.P. 54(b) certificate, so that they could appeal it. Their request was granted, and they appealed. The Sixth Circuit allowed Kroger's and Local 406's appeals and consolidated them with plaintiffs'. The dismissal of the case against Hamady was affirmed and the judgment in plaintiffs' favor was reversed with instructions that the case be dismissed, 807 F.2d 493; p. 65a. A timely motion for rehearing and a suggestion of rehearing en banc were both denied. See p. 93a.

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STATEMENT OF FACTS[2]

Since 1961 the collective bargaining agreement between Kroger and Local 406 had provided that "[t]his agreement shall be binding not only on the parties hereto, but also on their successors and assigns." See p. 807 F.2d at 495; p. 67a. Plaintiffs understood that clause to obligate Kroger to condition any sale of the warehouse on assump-

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[2] The facts as stated hereafter are the facts as presented and argued by plaintiffs to the jury at trial. The verdict in favor of plaintiffs on all issues allows the conclusion that the jury found the facts to be as plaintiffs urged them. In response to defendants' post-trial motions, the district court found: "that there is sufficient evidence to support each finding of the jury," 603 F.Supp., at 996; p. 35a.

tion of that contract by the buyer. So did Local 406—until called upon to enforce it. One of its business agents testified that, until educated by counsel, the clause was understood to protect the employees in the event of a transfer like that to Hamady. Kroger also under the contract as did plaintiffs—until called upon to honor it. Its 1961 negotiator testified that Kroger knew that the clause was proposed by the union to protect its members in the event of a transfer like that to Hamady, and the labor relations executive responsible for the Kentwood warehouse admitted telling the union that it was Kroger's intention that "the contract go with the facility." Nonetheless, both Kroger and Hamady refused to honor the clause; Local 406 took only reluctant and half-hearted steps to implement it; and an arbitrator ruled that it was meaningless. This case is about how it happened that plaintiffs lost the job security everyone (they, their union, and their employer) thought they had and about their efforts to recover it.

Case against Local 406

In May, 1980, reports began to circulate that Kroger was looking to sell its stores in west Michigan. Officials of Local 406 heard those reports. They knew that the warehouse would be next; it supplied the stores. Although it believed Kroger to be obligated to condition sale of the warehouse on assumption of the contract, the union did nothing. On June 24, 1980, the union was notified by Kroger that it had agreed to sell its stores to Hamady and was likely to soon sell the warehouse. Still, the union did nothing. On August 6, 1980, Kroger agreed to transfer warehouse operations to Hamady. Plaintiffs and the union were told the next day. Hamady promised to hire exclusively from the Kroger work force, but said that it would not honor seniority. Still, the union did nothing.

Finally, two weeks later, the union acted. It met secretly with Hamady and traded its members' seniority rights for payments to the Teamsters' Central States Pension Fund. Although Local 406's bylaws mandate a membership meeting before contract negotiations, no such meet-

ing had been held. Although Local 406 had always before included in negotiations all stewards in a facility, none went to Hamady. The business agents went alone and in secret. The employees learned of the meetings only after the fact and not from the union. When they asked for details, they were assured that the business agents had pressed Hamady "until we were blue in the face" to honor seniority. That was a lie. The union had raised the issue only perfunctorily. Hamady's participation in the Central States Pension Fund was the union's objective.

The employees with seniority were upset to hear that they were to lose its benefits. Many had worked at the warehouse for 20 years; some for more than 30 years. They were also suspicious. Why were the meetings with Hamady secret? Why was no membership meeting called? Also suspicious was the exclusion of the stewards. When the employees demanded information, all they were told was, "Get your own lawyer if you are not satisfied." They did.

When plaintiffs hired a lawyer, things changed, but only in appearance. The stewards were invited to a meeting with Kroger and Hamady, and a membership meeting was called. Both were inconsequential and too late. The union had already traded away plaintiffs' seniority rights, but, it could be, and later was, said that usual procedures had been followed. The union then went to its lawyer. He told them that they had little chance of enforcing the contract, and the union used his opinion to justify its decision not to fight for seniority. That opinion was a classic example of an attorney constructing for a client a justification for actions already taken. The lawyer talked to a business agent by phone for 20 minutes. The lawyer was not familiar with the contract he was interpreting; he had never read it; he knew nothing of its negotiating history, and he did not ask. None of the particulars of the warehouse transfer were known to the lawyer, and he did not ask about them. He did not review any law. Nonetheless, he instantly opined that there was no chance of prevailing

against Hamady and a poor chance of prevailing against Kroger.

The attorney's opinion did not convince plaintiffs to give up. On October 7, 1980, they filed a grievance against Kroger. A few days later, a grievance by the union surfaced. The union insisted that its had been filed first. It had, in fact, been filed later and backdated. The employees' persistence brought intimidation. They were evicted from union meetings. They were not allowed to vote on the new Hamady-Local 406 contract. When they took to picketing their own union hall, they were harassed. The union also took to the media, announcing that plaintiffs' grievances were weak and that they had been poor employees undeserving of employment by Hamady.

Forced to process a grievance it had tried to avoid, the union orchestrated a loss. The contract established a four-step grievance procedure. The first two steps were within the warehouse. Step 3 involved a regional joint committee in Chicago consisting of a Kroger executive and a union official neither of whom had any involvement with the Kentwood warehouse. Arbitration was available only if that committee deadlocked. The union tried to thwart each step. It did not notify the employees of the first two steps. Its presentation at Step 3 was perfunctory. Historically, even grievances involving entire operations were usually decided, one way or another, at that step. Nonetheless, the business agent did nothing more than read aloud plaintiffs' handwritten grievance. He made no supporting presentation. Only when the employees insisted on speaking was anything of substance presented. But for their presentation, the grievance would have been denied. The union member of the committee said so. That would have ended the grievance.

Having been denied defeat, the union joined Kroger to keep the case from arbitration. When Kroger petitioned for, and obtained, a rehearing, Local 406 refused to appear, claiming that to do so would legitimize an unauthorized rehearing. It took that position even though ad-

vised that its negotiator of the contract thought that it authorized rehearings. Unopposed, Kroger won. The grievance was denied. But for plaintiffs' persistence, review would have been at an end.

The transfer of warehouse operations was scheduled for October 18 and 19, 1980. On October 16, plaintiffs filed suit to enjoin that transfer until their seniority rights were settled. They had asked Local 406 to file suit, but it had refused.[3] A restraining order was issued—over the union's objection. It wanted the transfer to occur. By the end of the day, Kroger and Local 406 were back in court jointly seeking to quash that order. They both claimed that a gala grand opening scheduled for October 20 could not be rescheduled without substantial hardship. The order was set aside. The Court was moved by the union's siding with Kroger. But, there was no grand opening until weeks later.

On February 11, 1981, the union filed a complaint seeking to force the case to arbitration. Kroger objected, taking the position that the denial at the Step 3 rehearing precluded arbitration. The plaintiffs objected to being represented by the union; they had lost all confidence in it. The trial court ordered arbitration, but authorized plaintiffs to have a spokesman present. The union was to be in charge, however. After considerable delay, an arbitration was held. Local 406 did its best to lose. Not only was its presentation calculatedly weak, it undertook a strategy of active interference with plaintiffs. The union's counsel started the arbitration by attempting to discredit plaintiffs' counsel. He objected to almost all the evidence offered by the plaintiffs and repeatedly interrupted their counsel's examination and cross-examination of witnesses. He constantly challenged the credibility of the employees who testified, even though they were his clients and their testimony was essential to proving the grievances. He objected to plaintiffs' introduction of the transfer documents,

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[3] The plaintiffs were taking this Court's advice on what to do to protect themselves. See *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 258, fn 3 (1974).

although there was no hope of prevailing without them. The union also tried to stipulate away the case. The Kroger-Local 406 contract applied to the "parties[']" successors and assigns. The retail clerks' contract, on the other hand, applied only to the union's successors and assigns. Local 406 offered to stipulate that its contract was identical to the clerk's contract. Finally, the union submitted as an exhibit its counsel's letter characterizing as poor the cases against Hamady and Kroger and called that letter to the arbitrator's attention in argument and in its post-hearing brief. The employees lost. The arbitrator ruled in favor of Kroger that the successor-and-assigns clause was meaningless. He also ruled in favor of Hamady, even though it had boycotted the proceeding. *Kroger Co., supra,* 78 *Lab. Arb. Rep.,* at 589-591.

The arbitration was stenographically recorded. The entire transcript was in evidence at trial. Three highly qualified experts studied it. Plaintiffs' expert testified that it reflected numerous signals by the union that it did not want to prevail. Based on his experience, which consisted of having presided over some 500 arbitrations, he testified that such "signals" have a "tremendously powerful influence" on arbitrators; they "grossly distort the arbitration process and make the outcome unreliable." Local 406's expert agreed. He testified that signals to an arbitrator from a union that it is unenthusiastic about a grievance "place intolerable strains on the arbitral machinery" and are "wholly incompatible with [a] fair adjudication." Kroger's expert concurred. Neither defense expert believed that Local 406 had given such signals, but both agreed that, when given, they undermine the integrity and reliability of arbitrations. The jury believed that signals had been given.

Case against Kroger

The jury also found that the successor-and-assigns clause obligated Kroger to condition the transfer to Hamady on its assumption of the contract. That finding

was amply supported by the evidence. As previously noted, Kroger's representative at the 1961 negotiations which first placed that clause in the contract testified that Kroger understood that it was proposed by the union to deal with the very situation in which plaintiffs found themselves, and the labor relations executive responsible for the Kentwood warehouse admitted in a memorandum having advised Local 406 that it was Kroger's intention that the contract "go with the warehouse."

Two items of circumstantial evidence corroborated the direct. In the documents selling the stores to Hamady, Kroger had warranted that, with the exception of the meatcutter's contract, "none of the labor contracts related to the stores . . . contain a clause which will require purchaser to accept the terms and conditions of said labor contract." No such warranty appeared in the documents transferring the warehouse. Had not Kroger understood the successor clause in the warehouse contract to require that it "go with" the facility, it would have given a similar warranty. And, prior to transferring the Kentwood warehouse, Kroger had transferred warehouses in Chicago, Pittsburgh, and Kansas City. In each instance, the employees at those warehouses were represented by the Teamsters Union, their contracts contained a successor clause identical to that in the Local 406 contract, and the purchasers honored those contracts. Had not the successor clauses in the contracts applicable to those three warehouses been understood by both Kroger and the Teamsters to require their transfer, it is highly doubtful that, in all three instances, the purchasers would have been induced to honor the contracts.

Case against Hamady

Hamady assumed operation, but not ownership, of the warehouse on October 20, 1980. Its agreement with Kroger was a 7-year lease. In addition to retaining title to the premises and equipment, Kroger retained a substantial interest in the warehouse's operation. It continued to supply goods to the warehouse, for Hamady continued to sell Kro-

ger products, and it assisted Hamady with product development and merchandising. Kroger and Hamady had plans "to work together to build a mutually profitable and growing business, now and in the future." While Kroger and Hamady were unrelated entities, they effectively operated the warehouse jointly.

Hamady hired its entire work force from among Kroger warehouse employees, but from those with the least seniority. Of the 199 individuals employed as laborers by Kroger at the warehouse, Hamady hired 100. All of Hamady's supervisors had held similar positions with Kroger. While still employed by Kroger they had had the final say on who was hired. The employees continued to perform their same jobs, using the same means and methods. Although some job classifications were eliminated, most were already vacant at the time of the takeover. For the employees nothing changed except their benefits.

Hamady operated the warehouse for a few days longer than one year. In November, 1981, it decided to supply the former Kroger stores from its own warehouse in Flint, Michigan. It closed the Kentwood facility and discharged all of its employees. Soon thereafter, it also closed all of the stores. Kroger retook possession of the warehouse and leased it to somebody else in another industry. At the time of trial in 1984, Kroger still owned the warehouse.

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REASONS FOR GRANTING THE WRIT

This petition presents five questions. Each is deserving in its own right of review by this Court. Not only does each center on a principle fundamental to federal labor law policy, each was decided by the Sixth Circuit in a fashion which frustrates that policy. And, the Sixth Circuit's resolution of each of those questions directly conflicts with decisions by other Circuits, with the Sixth Circuit always in the minority. That several questions are presented makes this case a unique opportunity to implement federal labor law policy. Not only can several important issues be efficiently resolved at once, a synergism is at work.

Each question amplifies each other question, making more complete the resolution of each. This case is also an especially good vehicle for review because the record is complete. The issues are framed, not by pleadings and affidavits, but by six weeks of trial proofs.

Question 1

In order to vacate an arbitration decision what, if anything, must an employee-plaintiff in a hybrid 301 action prove in addition to a breach by his or her union of its duty of fair representation at that arbitration?

The jury in this case was specifically asked to determine whether Local 406's breach of its duty of fair representation, if it found there was such a breach, "seriously undermine[d] the integrity of the arbitration process," 807 F.2d, at 497; p. 72a. It was given the following instruction to aid it in answering that interrogatory:

> "In order to show that the Union's breach seriously undermined the integrity of the arbitration process, the plaintiffs must show that the arbitration process was seriously flawed and that the arbitration fundamentally malfunctioned in a way that denied the plaintiffs a fair and adequate hearing." 603 F.Supp., at 1000; p. 45a.

Therefore, by its finding that the union's breach had "seriously undermine[d] the integrity of the arbitration process," the jury necessarily concluded that, because of that breach, the arbitration process had been "seriously flawed" and that the arbitration itself had "fundamentally malfunctioned in a way that denied the plaintiffs a fair and adequate hearing." The Sixth Circuit agreed with the defendants that those findings were insufficient:

> "Even in the event of a Union's breach of its duty of fair representation, an arbitration award is not quickly set aside. Kroger correctly asserts that to vacate an arbitration award on this ground, there must be two findings. First, the union must have breached its duty of fair representation to the employee. Second, the breach of duty by the union must have tainted the

arbitrator's decision. The breach must have contributed to the arbitrator's making an erroneous decision." 807 F.2d at 500; p. 79a.

(A)

The Sixth Circuit's decision in this case it at odds with decisions by several other circuits. The First Circuit held in *Sear v Cadillac Automobile Company of Boston,* 654 F.2d 4, 7 (1981), that "the employee must show a union breach of duty that 'seriously undermine[d] the integrity of the arbitral process.' " See also *Early v Eastern Transfer,* 699 F.2d 552, 555 (1st Cir., 1983), *cert. denied,* 464 U.S. 824 (1983). In *Santos v District Council of New York,* 547 F.2d 197, 202 (1977), the Second Circuit reversed a summary judgment in favor of a union, holding that "if it seriously undermines the integrity of the [grievance] process, the union's breach also removes the bar of the finality provisions of the contract.' " In *Del Casal v Eastern Airlines, Inc.,* 634 F.2d 295, 299 (1981), *cert. denied,* 454 U.S. 892 (1981), the Fifth Circuit held that "a union's breach of its duty of fair representation may invalidate an otherwise binding arbitrated decision if it 'seriously undermines the integrity of the arbitral process.' " In *Miller v Gateway Transportation Company, Inc.,* 616 F.2d 272, 277 (7th Cir., 1980), a summary judgment in favor of an employer was reversed because "if the quality of representation provided by the Union is such that it 'seriously undermines the integrity of the aribtral process,' then 'the bar of finality provision of the contract' is removed." In *Tatum v Frisco Transportation Co.,* 626 F.2d 55, 59 (1980), the Eighth Circuit held that an employee who loses an arbitration can obtain judicial review "if there was evidence that the arbitral process had been seriously undermined by the union's failure to represent him." In *Barnett v United Airlines, Inc.,* 738 F.2d 358, 362 (1984), *cert. denied,* 469 U.S. 1087 (1984), the Tenth Circuit observed that "[i]f an employee can establish that his union breached its implied duty of fair representation, even a *binding* decision . . . can be set aside

if the breach seriously undermined the integrity of the arbitral process" [emphasis in original].

The Sixth Circuit based its holding in this case exclusively on *Hines v Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). In each of the above conflicting cases the Court was also quoting and applying *Hines*. Not one of those Courts understood that case as did the Sixth Circuit in this case to also require a distinct showing that the union's breach must have contributed to the arbitrator's adverse decision. Only the Third Circuit concurs with the Sixth, *Deboles v Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (1977).

(B)

The conflict among the Circuits can be attributed to conflicts within and among this Court's key opinions giving content to hybrid 301 actions. *Hines* itself can be read as stating three different standards. Section III of the opinion in that case was devoted to explaining when a grievance decision is not binding. The Court began that section by noting that the bar of finality is removed by a union's breach of duty which "seriously undermines the integrity of the arbitral process," *Hines, supra*, 424 U.S., at 567. The Court then noted that when the employer prevails, there remains the question of "whether the contractual protection against relitigating an arbitral decision binds employees who assert that the process has fundamentally malfunctioned by reason of the bad-faith performance of the union," *Id.*, at 569. It concluded the section by observing that "we cannot believe that Congress intended to foreclose the employee from his § 301 remedy otherwise available against the employer if the contractual processes have been seriously flawed by the union's breach of its duty," *Id.*, at 570. It is those statements which a majority of the Circuits read as reflecting the holding of *Hines*.

Sandwiched in between those several statements is a single passage which says that a hybrid 301 action focuses on two questions, one of which is whether there is "substantial reason to believe that a union breach of duty con-

tributed to the erroneous outcome of the contractual proceedings," *Id.*, at 568. It is that passage which the Third and Sixth Circuits see as controlling.

Section III closes with two observations which appear to state yet another rule. The Court stated that "to prevail against either the company or the union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating [a] breach of duty by the union," *Id.*, at 570. It explained that private grievance systems would "cease to qualify as an adequate mechanism" of dispute resolution if "erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory," *Id.*, at 571. Proving a breach of duty is enough, according to these concluding comments, to overcome the bar of finality. That is what Justice Stewart understood the Court to be saying: "I agree with the Court that proof of breach of the union's duty of fair representation will remove the bar of finality from the arbitral decision," *Id.*, at 572.

The confusion has persisted in subsequent cases. This Court's statement of *Hines* in *United Parcel Service, Inc. v Mitchell*, 451 U.S. 56, 61-62 (1981), appears to articulate two distinct standards. First, the Court stated that "as *Hines* makes clear," an employee may challenge an arbitration award if "he demonstrates that his union's breach of its duty 'seriously undermine[d] the integrity of the arbitral process,' " *Id.*, at 61. In the very next sentence, however, it stated that an erroneous arbitration decision need not stand "in the face of the union's breach of its duty," *Id.* There was stated no requirement that the breach undermine the integrity of the process. In the next paragraph the burden on the employee was stated as being two-fold: first, to prove a wrongful discharge by the employer, and, second, to prove a breach of duty by the union, *Id.*, at 62. Then, the Court identified as "the indispensible predicate" of a 301 action "a demonstration that the union breached its duty of fair representation," *Id.*

Finally, the Court held that the plaintiff in the case before it had "in some way to show that the Union's duty to represent him fairly at the arbitration had been breached," *Id.* In *Del Costello v International Brotherhood of Teamsters,* 462 U.S. 151 (1983), only one standard is stated: An employee may bring a 301 action, notwithstanding an adverse arbitration decision, when his or her union has "breach[ed] its duty of fair representation," *Id.,* at 164. There is nothing in the opinion about undermining the integrity of the arbitral process.

One of three things has happened. First, the Court is saying the same thing in different ways. Second, the Court has changed the standard. Third, the Court is unsure of the standard. The first of the three is the most likely. The Court's various statements can be reconciled. Given the egregious conduct which constitutes a breach of duty by a union, when there has been a breach during an arbitration, the integrity of the process has been undermined, creating substantial reason to believe that the outcome has been affected. Whatever is the situation, only this Court can tell the bench and bar.

(C)

Encouraging the use of contractual grievance procedures is "[f]undamental to federal labor policy," *United Parcel Service, Inc. v Mitchell, supra,* 451 U.S., at 63, quoting *Steelworkers v Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581 (1960). Hybrid 301 actions were created to fulfill that policy. Although courts should not routinely review arbitration decisions, *United Steelworkers v Enterprise Wheel and Car Corp.,* 363 U.S. 593, 598-599 (1960), some judicial review is necessary to preserve contractual procedures. Were union conduct unreviewable, there would be "grave constitutional problems" with giving unions the exclusive bargaining power which is at the heart of labor policy. *Steel v Louisville & N. R. Company,* 323 U.S. 192, 198-199 (1944); *Vaca v Sipes,* 386 U.S. 171, 182 (1967); and *Del Costello v International Brotherhood of Teamsters, supra,* at 164, n 14. And, if arbitration decisions

were unreviewable "even though the employees' representation by the union has been dishonest, in bad faith, or discriminatory," "[t]he contractual system would then cease to qualify as an adequate mechanism to secure individual redress for damaging failure of the employer to abide by the contract," *Hines, supra*, 424 U.S., at 571, falling into disfavor and disuse. In short, without the 301 action the entire system of collective bargaining might collapse.

The Sixth Circuit's decision in this case frustrates that policy of encouraging resort to grievance procedures. It does so by imposing "an insurmountable burden on plaintiffs," 603 F.Supp. at 1001; p. 45a. Because an arbitrator, no differently than a judge or a juror, may not testify to explain his decision, *Lewis v NLRB*, 779 F.2d 12, 13 (6th Cir., 1985), and because an arbitrator is not likely to write a decision which states that union misconduct contributed to the outcome, cf., *United States v Miller*, 753 F.2d 19, 23 (3rd Cir., 1985), no employee is likely to prove that the union's breach "must have contributed to the erroneous outcome" of the arbitration. Therefore, requiring such proof means that no hybrid 301 can ever succeed. The existence of even a small group of cases in which there is no remedy for a union's breach of duty "would frustrate the basic purposes underlying the duty of fair representation doctrine," *Vaca v Sipes, supra*, 386 U.S., at 182.

Question 2

Is a union's breach of its duty of fair representation at an arbitration necessarily rendered harmless as a matter of law if the employee was represented by his or her own counsel?

The question certified to the Sixth Circuit related to the adequacy of the jury's instructions defining plaintiffs' burdens. Ordinarily, a decision that the burden had not been properly stated would result in a new trial. Not so in this case. The Sixth Circuit concluded that plaintiffs would never be able to sustain their burden:

"Plaintiffs' independent attorneys assured that plaintiffs' interests were fully represented. Any breach by the Union of its duty of fair representation therefore could not have tainted the decision of the arbitrator." 807 F.2d at 501; pp. 80-81.

(A)

The decision in this case is in direct conflict with decisions by three other circuits. See *Edwards v Capital Airlines,* 176 F.2d 755 (DC Cir., 1949) *cert. denied,* 338 U.S. 885 (1949); *Hiller v Liquor Salesmen's Union Local Nov. 2,* 338 F.2d 778, 779-780 (2nd Cir., 1964); and *Hotel & Restaurant Employees, Etc. v Michelson's Food Services, Inc.,* 545 F.2d 1248 (9th Cir., 1976). In *Edwards,* the Court agreed with plaintiffs that a grievance board decision was not binding on them, even though they had been represented by their own attorneys. In *Hiller,* the Court held that, when the interests of employees and their union are antagonistic, allowing them their own counsel "fails to cure the defects," 338 F.2d at 779. In *Michelson's,* it was held that an employee can both participate in an arbitration "in person and by counsel" to protect his or her own interest and, then, if it is adverse, "attack the award on the ground that it was the result of the Union's bad faith, fraud or collusion," 545 F.2d at 1252.

(B)

The decision in this case also conflicts with common sense. In virtually every case in which reversible error is found on appeal, the appellant was represented by competent counsel, yet the error occurred. It is the duty of attorneys to attempt to prevent error. It is not within their capacity to always prevent it, however. Certainly, they cannot prevent it by their mere presence. The Sixth Circuit's holding is, therefore, predicated on a grossly inaccurate assessment of the role and of the ability of counsel. In any given case, an error may not be reversible because it could have been corrected by counsel and was not or because counsel rendered it harmless. However, in many cases prejudicial error occurs de-

spite the presence of counsel and substantial efforts to avoid it.

Question 4[4]

If employee-plaintiffs in a hybrid 301 action prove that their union failed to adequately represent them, are they entitled to recover from the union the expenses incurred in seeking a fair resolution of their claim, even though they do not prevail against the employer?

Shortly after trial began, the District Court ruled:

> "If a union fails to fairly represent the contractual rights of a group of employees, and its non-action is either 'arbitrary, discriminatory, of [sic] in bad faith,' the employees are entitled to prevail against the union for expenses incurred in seeking a fair resolution of their claim, even if they do not prevail against the employer on the contract." 593 F. Supp., at 358; p. 13a.

That ruling was in response to an evidentiary motion not now relevant. Nonetheless, the ruling came to have substantial significance on appeal. Plaintiffs argued that, even if the judgment against Kroger was set aside, the case should not be dismissed, but remanded for a trial on damages, albeit damages only against the union. The Sixth Circuit rejected that argument:

> "The Union is intended to serve as the exclusive agent for the member employees and employees should be discouraged from pursuing their claims independently. Moreover, it is against 'sound judicial policy to encourage actions to recover only the costs of litigation where no underlying right can any longer be vindicated in the action' [citation omitted]. Granting attorneys' fees to each member employee who demonstrates a breach of the duty of fair representation but

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[4] Petitioners reserve the right to argue Question 3 in the event certiorari is granted, but do not include Question 3 among the reasons for the granting of certiorari. Although deserving of review by this Court for the reasons stated in this petition, Question 4 need be resolved only if both Questions 1 and 2 are decided against petitioners.

no injury will lead to frivolous actions. We hold that plaintiffs are not entitled to recover attorneys' fees from the Union." 807 F.2d at 503; p. 86a.

(A)

The conflict between the decision in this case and decisions by other circuits is apparent on the face of the opinion. The Sixth Circuit acknowledged that "[s]everal courts have held that an employee may recover attorneys' fees even where the outcome of the arbitration favored the employer," 807 F.2d at 503; p. 85a. Those Courts were identified as the First Circuit: *Stanton v Delta Airlines, Inc.,* 669 F.2d 833, 838 (1982); the Fifth Circuit: *Del Casal v Eastern Airlines, Inc., supra,* at 301; and the Ninth Circuit: *Dutrisac v Caterpillar Tractor Co.,* 749 F.2d 1270, 1275-1276 (1983). See also *Seif v Drivers, Chauffeurs, Etc., Local 61,* 620 F.2d 439, 44 (4th Cir., 1980). The Sixth Circuit "decline[d] to follow" those circuits, 807 F.2d at 503; p. 86a.

(B)

The primary reason given by the Sixth Circuit for its refusal to follow the other circuits calls for review by this Court: "[E]mployees should be discouraged from pursuing their claims independently," 807 F.2d at 503; p. 86a. While it is federal labor policy to encourage employees to utilize contractual grievance procedures, *Vaca v Sipes, supra,* 386 U.S. at 184, it is contrary to that policy to discourage employees from bringing actions such as this one. Doing that would dilute unions' incentives to honor their duty and would undermine employees' faith in unions and in grievance procedures.

(C)

The Sixth Circuit's decision in this case is based on a misapprehension of the true nature of the duty of fair representation. That duty is not to prevail in negotiations or to win grievances. In return for ceding bargaining authority to a union, employees are entitled to fair representation. When they do not get it, they are denied both the

benefit of their bargain and the benefits of the unique relationship between employees and their union. Any effort and expense undertaken by them in replacing what the union should have provided "is the harm itself," *Dutrisac v Caterpillar Tractor Co., supra,* at 1275. Therefore, reimbursement of those expenses is compensation for their "actual loss," nothing more. No windfall is involved.

Question 5

Are employee-plaintiffs in a hybrid 301 action against both their union and their employer entitled to a jury trial?

All the issues in the cases against Local 406 and Kroger were submitted to a jury. The majority opinion in this case did not decide whether that was proper. A separate concurring opinion did address that "important issue," however, 807 F.2d at 504; p. 87a. It concluded that the breach of contract claim against Kroger had properly been submitted to a jury, but that the duty of fair representation claim against the union, because it was equitable in nature, should have been decided by the court. Because the majority, although it did not formally address the issue, noted that it did not disagree with the concurrence's analysis, 807 F.2d at 504, fn 3; p. 86a, the issue is ripe for review by this Court.

(A)

The Sixth Circuit's decision in this case conflicts directly with decisions in three other Circuits. In *Cox v C. H. Masland & Sons, Inc.,* 607 F.2d 138, 143 (1979), the Fifth Circuit held that because, just as in this case,[5] the plaintiff-employee sought only damages, "he had a right to a jury trial both on the primary claim that the company

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[5] By the time that this case went to trial, the only relief sought by plaintiffs were monetary damages. Originally, they had tried to stop the transfer of the warehouse. When that failed, they sought reinstatement and reimbursement for lost benefits. By trial, the warehouse was no longer operating, meaning that there were no jobs to which they could be reinstated.

discharged him in violation of the collective bargaining agreement and on the corollary contention that the union failed fairly to represent him." See also *Roscello v Southwest Airlines Co.*, 726 F.2d 217, 220-221 (5th Cir., 1987). Similar decisions were reached in *Quinn v DiGiulian*, 739 F.2d 637, 646-647 (DC Cir., 1984); and in *Minnis v International Union Automobile, Aerospace, Etc.*, 531 F.2d 850, 852-853 (8th Cir., 1975).

(B)

Even if it did not conflict with other cases, review of this case would be appropriate because it is the first appellate decision to preclude juries in fair representation cases. "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care,'" *Beacon Theatres, Inc. v Westover*, 359 U.S. 500, 501 (1959), quoting *Dimick v Schiedt*, 293 U.S. 474, 486 (1934).

(C)

The decision in this case merits review by this Court for a third reason. It is based upon a misapprehension of the nature of duty of fair representation claims. The concurring opinion started with the correct premise. If a case presents both legal and equitable issues, a jury is to decide all the legal issues, including those "incidental" to equitable ones, *Dairy Queen, Inc. v Wood*, 369 U.S. 469, 470 (1962), and *Curtis v Loether*, 415 U.S. 189, 196, fn 11 (1974), and the order of trial must be arranged so that any issues of fact common to the legal and equitable claims are tried to a jury before the Court passes on the equitable claims, with the Court then bound by the jury's findings, *Beacon Theatres, Inc. v Westover, supra*, 359 U.S., at 510-511, and *Dairy Queen, Inc. v Wood, supra*. The concurring opinion went astray in its conclusion that a duty of fair representation claim is "primar[ily]" a device for setting aside an arbitration award. It is both such a device and a distinct cause of action against a union. As the lat-

ter, it does not involve setting aside an arbitration award, *Del Costello v Teamsters,* 462 U.S. 151, 167 (1983), quoting *United Parcel Service v Mitchell, supra,* 451 U.S., at 73 (concurring opinion per Stevens, J.). Because, as a claim against a union, a breach of duty claim is just what it purports to be, an action for redress because an owed duty has been violated, such a claim is typical of what juries consider. The coincidence that the same thing must be proven to set aside the arbitration award does not alter the jury-submissibility of the issue.

Question 6

Can a succeeding employer be obligated to honor the substantive provisions of a collective bargaining agreement with its predecessor, even though it has not assumed that agreement, in any situation other than a merger where the predecessor disappears into the successor?

At the close of plaintiffs' proofs, the District Court dismissed the case against Hamady. Among its findings were the following: All Hamady's employees had been Kroger employees with most performing the same jobs they had held with Kroger. The supervisors all came from Kroger. There were no major changes in the operations of the warehouse, just minor ones. Hamady continued to sell Kroger products, and the warehouse processed those products. See p. 24a. Nevertheless, the Court held that "Hamady is not bound by the terms of the Kroger-Local 406 contract" because of some other factors which it found dispositive. See p. 32a. The Sixth Circuit affirmed, using the same considerations:

> The District Court correctly observed that the application of the 'substantial continuity' test is fact specific [citation omitted]. Although Hamady did hire fifty-one percent of the former Kroger employees, the Court found, on the basis of the facts of the case now before this Court, that the distinctions between this case and *Wiley* were controlling. The Court stressed the facts that Kroger, the original employer, did not disappear; that state law provides for no assumption

> of obligations by a purchaser of assets; and that there were significant differences in the operations of Kroger and Hamady [citation omitted]. The transaction between Kroger and Hamady was an arms length transaction. Finally, the District Court added that policy considerations favored Hamady in this case. The Kroger warehouse was failing and Hamady knew substantial changes would have to be made for it to be made profitable. The Court found that if Hamady had known it would have to adopt the contract, it would not have purchased the warehouse at all. [Citation omitted]." 807 F.2d at 500; p. 78a.

The Court based its decision on a synthesis of *John Wiley & Sons v Livingston,* 376 U.S. 543 (1964); *NLRB v Burns International Security Services,* 406 U.S. 272 (1972); and *Howard Johnson Co., Inc. v Detroit Local Joint Executive Board, Etc.,* 417 U.S. 249 (1974). A fourth case is also relevant: *Golden States Bottling Co. v NLRB,* 414 U.S. 168 (1973). That synthesis and its use in this case warrant review by this Court.

(A)

The decision in this case conflicts with decisions by other Circuits as to the relevant criteria for evaluating continuity, as to the consequences of continuity, and in the application of those criteria to virtually identical facts.

(1)

While the Sixth Circuit mentioned other factors as supporting dismissal of the claim against Hamady, the key factor was the absence of a merger, for the Court effectively defined continuity in those terms. It stated *Wiley* as holding no more than that a pre-existing contract may survive when a company disappears "by merger," 807 F.2d at 499. It read *Burns* as confirming that *Wiley* had held narrowly "that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation," *Id.,* and it read *Howard Johnson* as having "emphasized the differences between a merger and a purchase of assets," *Id.,* at 500. That reading of the "successorship" cases conflicts directly with two other Circuits.

The Third Circuit held in *United Steelworkers of America v Reliance Universal, Inc.*, 335 F.2d 891, 894 (1964), that "the legal and equitable considerations involved in imposing a predecessor's obligations upon an independent successor are no different in a merger case than in a sale of business case." In *General Teamsters Local 249 v Bill's Trucking, Inc.*, 493 F.2d 956, 958 (3rd Cir., 1974), a summary judgment in favor of a successor employer was reversed even though there had been no merger, but a sale of stock. The Fifth Circuit reads this Court's decisions on successorship as does the Third, not as does the Sixth. In *United Steelworkers of America v United States Gypsum Co.*, 492 F.2d 713, 722 (1974), *aff'd on rehearing*, 498 F.2d 334 (1974), *cert. denied*, 419 U.S. 998 (1974), that Circuit declined to restrict to mergers the principle that a successor employer may be obligated to honor the terms of its predecessor's labor contracts. It is enough if the employees demonstrate "an almost uninterrupted continuation of the same labor environment as existed with the previous employer and owner of the business enterprise," *Id.*, at 726. See also *Boeing Co. v International Association of Machinists & Aerospace Workers*, 504 F.2d 307, 321 (5th Cir., 1974).

(2)

A second conflict of principles can be resolved by this case. Some circuits hold that the successorship doctrine does not authorize courts to impose any of the substantive provisions of a collective bargaining agreement, but, at most, the obligation to arbitrate, *Bartenders & Culinary Workers v Howard Johnson Co.*, 535 F.2d 1160, 1162 (9th Cir., 1976), and *Bates v Pacific Maritime Assn.*, 744 F.2d 705, 706 (9th Cir., 1984), or the duty to bargain, *International Union of Electrical, Radio and Machine Workers v NLRB*, 604 F.2d 689, 693 (DC Cir., 1979); *Price v United States*, 599 F.2d 594, 597 (4th Cir., 1979); and *Equal Employment Opportunity Commission v MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1089-1090 (6th Cir., 1974). The opposite conclusion was reached by the Third and Fifth Circuits. In *Reliance Universal, su-*

pra, at 895, the Third Circuit held that, in the event of a successorship cognizable by the courts, "[t]he requirements of the contract remain basic guides to the law of the shop." In *Bill's Trucking, supra,* that Court remanded for trial with instructions to implement the predecessor's contract if sufficient continuity were established. The Court rejected the argument that the substantive terms of a preexisting contract cannot be imposed on a successor *Id.,* at 959, fn 8. In *United States Gypsum, supra,* at 725, 726, the Fifth Circuit also declined to adopt the position that a successor cannot be bound to the substantive provisions of its predecessor's collective bargaining agreement and affirmed holding the successor before it to honor the dues check off and wage reopener provisions of its predecessor's labor agreement.

(3)

Not only does the decision in this case conflict with other cases as to fundamental principles, it also differs with another case in its evaluation of a given set of facts. In *United Steelworkers of America v United States Gypsum Company, supra,* the Fifth Circuit "easily found" substantial continuity where the successor employer had purchased substantially all of its predecessor's assets, hired all but three of its employees, including supervisors, and continued the physical operation of the purchased facility intact, 492 F.2d at 722. "[T]he terms of employment were substantially the same as before the purchase. So, too, was the physical operation—same work force, same plant, same process, same product (except for trade name), under the same supervisors," *Id.,* at 716. Substantial continuity existed because there was "an almost uninterrupted continuation of the same labor environment as existed with the previous employer and owner of the business enterprise," *Id.,* at 726.

The transfer from Kroger to Hamady is another example of the same thing. If the lease from Kroger to Hamady was an arms length transaction, it amounted to the purchase of substantially all of Kroger's assets in the warehouse. Hamady hired exclusively from the Kroger

warehouse. The operation of the warehouse did not change. The same work force did the same jobs under the same supervisors in the same plant utilizing the same processes and handling the same products. Had this case been tried in the Fifth Circuit, not only would plaintiffs' case not have been dismissed, judgment would have been entered in their favor.

Ordinarily, conflicting factual evaluations would not merit review by this Court. However, in the development of the law of successorship "emphasis on the facts of each case as it arises is especially appropriate," *Howard Johnson, supra,* 417 U.S., at 256. Therefore, facts which prompt conflicting decisions on successorship are especially appropriate for review by this Court.

(B)

The variations among the Circuits reflect an uncertainty in the law of successorship. That uncertainty is attributable, in part, to the subject. The question of successorship is inherently difficult, *Howard Johnson, supra,* 417 U.S., at 256. It can arise in a myriad of factual circumstances and legal contexts, and there is no congressional guidance, *Id.* Uncertainty also follows from how this Court has addressed the issue. Although recognizing that its decisions are "to some extent inconsistent", *Id.,* at 254, the Court has declined to try a reconciliation, *Id.,* at 256, and it has compounded the uncertainty inherent in that inconsistency by using terminology which is susceptible to differing interpretations, mixing terminology, Note, "Appropriate Standards of Successor Employer Obligations under *Wiley, Howard Johnson* and *Burns*," 25 *Wayne L. Rev.* 1279, 1295, 1298 and 1304 (1979), not using the test which it appears to have enunciated, Note, "The Impact of *Howard Johnson* on the Labor Obligations of the Successor Employer," 74 *Mich. L. Rev.* 555, 579 (1976), and relying heavily in one case (*Howard Johnson*) on criteria which it dismissed in an earlier case (*Golden State*) as irrelevant, 417 U.S., at 257. Finally, the Court's decisions are perceived as reflecting "fundamentally dif-

ferent attitudes toward the collective bargaining agreement and toward the interests at stake in the typical successorship situation," 74 *Mich. L. Rev.* at 566, depriving courts and litigants of any common base from which to seek guidance. In sum, "[t]he extent to which a successor to the ownership of a business must assume the labor obligations of the preceding owner is a much-clouded issue of federal labor law," 74 *Mich. L. Rev.* at 555; and Note, "Contract Rights and the Successor Employer: The Impact of *Burns Security*," 71 *Mich. L. Rev.* 571, 582 (1973). "[W]hat constitutes a 'successor' remains a point of continuing controversy." 1 Morris, *The Developing Labor Law* (2d ed), pp. 712-713.

The effect of that uncertainty is to leave courts, business planners, unions and employees without guidelines to facilitate smooth transitions in ownership. In this era of mergers and takeovers, such guidelines are especially needed. Whether a business comes encumbered with a labor contract is a significant factor in evaluating the attractiveness of that business; it may mean the difference between its acquisition and a liquidation. At a minimum, it will affect the price. Whether a labor contract goes with a business can also have a major impact on the terms negotiated between management and labor. If, when a contract is being negotiated, there is any prospect of the business being sold before the contract expires, unless the employees can predict with some degree of certainty that the contract will protect them after such a sale, they are likely to insist on immediate, rather than deferred, benefits and to reject concessions. In sum, guidance from this Court, as well as silence, has the potential for major economic repercussions.

(C)

It is time for this Court to again address the issue of successorship. The nature of that issue requires "the traditional case-by-case approach of the common law," *Howard Johnson, supra,* 417 U.S., at 256. It has been 13 years since this Court has considered a case raising that

issue. Therefore, if the common law of successorship is to continue to develop, it is time to revisit it.

This is an appropriate case with which to continue that development. The fact that a merger was involved in *Wiley*, but not in *Howard Johnson*, was of significance because, given the state law context in which the *Wiley* merger occurred, an obligation to honor the contract "may have been fairly within the reasonable expectation of the parties." The circumstances of this case suggest the same conclusion, even though a sale of assets, not a merger, was involved. In the documents selling its stores to Hamady, Kroger warranted that, with the exception of the meatcutters' contract, "none of the contracts related to the stores . . . contain a clause which will require Purchaser to accept the terms and conditions of said labor contracts." No such assurance appeared in the documents transferring the warehouse to Hamady. The documents' silence allows the inference that it "may have been fairly within the reasonable expectation of the parties" that the contract went with the warehouse. So does Kroger having told the union that it intended for the contract to go with the warehouse. It is reasonable to infer that Kroger told the same thing to Hamady.

The facts which this Court stated in *Howard Johnson* as having been significant in *Wiley* are the facts proven by plaintiffs in this particular case. In particular, the Court noted that even after the *Wiley* merger, the predecessor's employees " 'continued to perform the same work on the same products under the same management at the same work place as before the change in the corporate employer,' " 417 U.S., at 258. That was the situation with regard to the operation of the warehouse once Hamady took it over. What appears to have been an especially key factor in *Howard Johnson* also is a factor here. In *Howard Johnson* the successor hired only 9 of the predecessor's 53 employees and none of its supervisors, a factor which this Court found extremely significant, 417 U.S. at 259-260. In this case, unlike *Howard Johnson*,

Hamady did not change the composition of the labor force. Not only did it hire its workers exclusively from the pool of Kroger workers, it hired a majority of the unionized workers and all of Kroger's supervisors.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. A jury, after six weeks of detailed proofs, concluded that Teamsters Local 406 had egregiously misrepresented petitioners and that they had been wrongfully discharged. Yet, the Sixth Circuit held that petitioners were entitled to no relief. To leave these employees remediless is "a great injustice," *Vaca v Sipes,* 386 U.S., at 185-186. To allow the Circuit's decision to stand will multiply "error and injustice of the grossest sort," *Hines, supra,* 424 U.S., at 571. To preserve the duty of fair representation as a bulwark against such injustice, the Sixth Circuit's decision needs to be reviewed and reversed.

Respectfully submitted,

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No. .....

—o—

In The

Supreme Court of the United States

October Term, 1986

—o—

KENNETH WOOD, *et al*,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, *et al*,

Respondents.

—o—

APPENDIX

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29 U.S.C. § 185:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENNETH WOOD, JEFFREY FANSLER, and CHARLES BOHNER, IN THEIR OWN RIGHT AND ON BEHALF OF ALL EMPLOYEES COVERED BY THE LABOR CONTRACT BETWEEN DEFENDANTS,

Plaintiffs,

v. File No. G80-742 CA

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 406; THE KROGER COMPANY; and HAMADY BROS. FOOD MARKETS, INC.,

Defendants. OPINION

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(Filed June 27, 1983)

This matter was originally filed in Kent County, Michigan, Circuit Court seeking damages and equitable relief against the defendants. The plaintiffs alleged that the duty of fair representation owed them by the union was breached during the events leading up to the transfer of certain property from Kroger to Hamady, that Kroeger breached the collective bargaining agreement into which it had entered with the union, and that Hamady should be bound by the then-existing collective bargaining agreement

pursuant to a successors and assigns clause in the collective bargaining agreement. On October 20, 1980, a petition for removal was filed seeking to have the matter removed to this Court. Jurisdiction was asserted under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. The plaintiffs filed a demand for a jury trial on November 12, 1980.

After leave was granted, the plaintiffs filed a supplemental complaint on May 11, 1982. In it, the original causes of action were reiterated, and the plaintiffs asserted three additional causes of action against Hamady—for unlawful handicap discrimination pursuant to M.C.L.A. § 37.1101 *et seq.*, for discrimination based on the prior filing of workers' compensation claims pursuant to M.C.L.A §§ 418.101 *et seq.*, 37.1101 *et seq.*, and for age discrimination pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* and M.C.L.A. § 37.2101 *et seq.* Now before the Court are the motions to strike the jury demand filed by Kroger and the Teamsters, based on the argument that the seventh amendment does not guarantee the right to a jury trial in § 301 actions such as this.

The right to trial by jury in civil cases is a basic and fundamental feature of our system of federal jurisprudence. The Supreme Court has held that courts should jealously guard against any diminution of this right. *Jacob v. City of New York,* 315 U.S. 752, 752-53 (1942). Indeed, the Supreme Court has held trial by jury to be the "normal and preferable mode of disposing of issues of fact in civil cases . . ." and that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Dimick v. Schiedt, 293 U.S. 474, 485 (1935). As the Supreme Court stated somewhat more recently, "[t]he federal policy favoring jury trials is of historic and continuing strength . . . ." *Simler v. Conner,* 372 U.S. 221, 222 (1963). It is within this framework that this "hybrid"[1] § 301 action should be viewed.

The test for determining whether there exists a right to trial by jury was set out in *Ross v. Bernhard,* 396 U.S. 531 (1970). There, the Court stated:

> The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.[10]
>
> [10]As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries.

396 U.S. at 538 & n. 10. Of course, where a case presents both legal and equitable issues, the right to jury trial on the legal issues may not be infringed. *Dairy Queen v. Wood,* 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

Actions brought under § 301 are governed by the body of federal substantive law fashioned by federal courts, *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), but this fact is not dispositive under *Ross* since this goes to the "character of the overall action." Neither is the fact that this action is a statutory cause of action, for even statutory actions which involve rights and remedies "typically enforced in an action at law," must be tried to a jury. *Curtis v. Loether,* 415 U.S. 189, 195 (1974)

(footnote omitted). The *Ross* test must be applied to determine whether the causes of action asserted by the plaintiffs against the Union and Kroger are legal or equitable in nature.

The claims against Kroger are clearly legal in nature. The plaintiffs allege that Kroger breached the collective bargaining agreement and also breached a stipulation entered into before this case was removed. The plaintiffs seek relief primarily in the form of damages. These claims are in the nature of breach of contract claims which were traditionally, and still are tried to a jury. By all of the criteria in *Ross*, these claims are new for which the right to trial by jury may be invoked.

The claims against the Union—primarily seeking damages for breach of the duty of fair representation and for breach of the stipulation—likewise should be tried to a jury. As previously discussed, the latter cause of action is analogous to a breach of contract claim. The former can be, and has been, analogized to a common law tort claim for which a right to jury trial exists.[2] For this reason, there exists a right to jury trial on all claims against the union.[3]

For the above reasons, the motions to strike the jury demand filed by the Union and The Kroger Co. are denied.[4]

Dated: June 27, 1983

/s/ Benjamin F. Gibson
U. S. District Judge

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[1] This is a "hybrid" action in the sense that the plaintiffs sue the Union for breach of its duty of fair representation and

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Kroger for breach of the collective bargaining agreement. *See United Parcel Service v. Mitchell,* 451 U.S. 56, 66 (1981) (Stewart, J., concurring); *Hines v. Anchor Motor Freight,* 424 U.S. 554 (1976); *Vaca v. Sipes,* 386 U.S. 171 (1967).

[2] *See, e.g., Cox v. C. H. Masland & Sons, Inc.,* 607 F.2d 138, 143 (5th Cir. 1979); *Minnis v. United Auto Workers,* 531 F.2d 850, 852 (8th Cir. 1975); *Kinzel v. Allied Supermarkets,* 88 F.R.D. 360, 362 (E.D. Mich. 1980).

It is interesting to note that the Sixth Circuit, in analyzing which statute of limitations should be applied in § 301 actions arising in Michigan, has also analogized duty of fair representation claims to common law tort claims. *Pitts v. Frito-Lay,* 700 F.2d 330, 334 (6th Cir. 1983); *Smart v. Ellis Trucking,* 580 F.2d 215 (6th Cir. 1978).

[3] Even if the duty of fair representation claims had been determined to have been an equitable claim, the plaintiffs would still be entitled to a jury trial on the breach of stipulation claim. *See Dairy Queen v. Wood,* 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

[4] Although the Court has held that this case will be a jury trial, this does not mean, however, that remedies which are equitable in nature will be decided by the jury rather than the Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENNETH WOOD, et al.,

Plaintiffs,

v. File No. G80-742 CA

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, et al.,

Defendants,

and

HARRY HIGHT, et al.,

Plaintiffs,

v. File No. G83-727 CA

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, et al.,

Defendants. OPINION

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In August of 1980, the Kroger Company transferred its Kentwood warehouse to Hamady Bros. Food Markets, Inc. The transfer was made by a sale of assets. Approximately 200 people, represented by Teamsters Local 406, worked in the Kroger warehouse at the time of the transfer.

When Hamady assumed control of the warehouse, it reduced the workforce. Contending that it was not bound by the collective bargaining agreement between Local 406 and Kroger, Hamady did not retain those workers with the highest seniority. Instead it took applications, conducted physicals, and ultimately made job offers to ap-

proximately 100 Kroger employees. Hamady did, however, proceed to bargain with Local 406, and a new contract was signed. The workers hired by Hamady did not retain the level of benefits they had enjoyed during their tenure with Kroger.

This dispute has arisen over a clause in the Kroger contract with Local 406 which provided that the agreement would be "binding not only on the parties hereto, but also on their successors and assigns." Plaintiffs, a group consisting largely of those not hired by Hamady Bros., claim that Kroger was bound by this clause to require, as a condition of the sale, that Hamady accept the collective bargaining agreement.

Shortly after the planned transfer to Hamady was made public, the plaintiffs began to doubt whether Local 406 was making sufficient efforts to protect their seniority rights. Consequently, plaintiffs hired their own attorney and, to the extent possible under the terms of their contract, took part in the three step grievance procedure. They ultimately filed suit against Kroger in state court, seeking a temporary restraining order to block the sale. The order was granted but later dissolved. The case was removed to federal court and, after a hearing, this Court ordered all parties to arbitration. The Court provided that, because there was some question about the Union's efforts to fairly represent the interests of the plaintiffs, the plaintiffs would be entitled to their own counsel at the arbitration hearing. Hearings were held during September of 1981. The arbitrator ruled in favor of Kroger, finding that the contract did not require Kroger to impose the collective bargaining agreement on Hamady.

Plaintiffs have sued Kroger, alleging a breach of the successors and assigns clause of the contract. They have also sued Hamady, claiming that, under federal common law, Hamady was bound to abide by the Kroger contract. Finally, they have sued Local 406, alleging that it breached its duty of fair representation by not protecting the seniority rights afforded by the Kroger contract.

Motions in limine were filed by defendants Local 406 and the Kroger Company, requesting the Court to exclude "all evidence with respect to the conduct of defendant Union which occurred prior to and/or outside of the arbitration proceeding conducted September, 1981." The Court declined to rule on these motions before trial concluding that, because the objections were based on the relevance of the testimony, the Court would be in a better position to consider their validity if they were raised at trial. The motions were renewed by Local 406 and the Kroger Company shortly after plaintiffs' first witness was called. Defendant Hamady Bros. joined in support of the motions.[1]

Defendants' basic position is that any relevant breach by the Union of its duty of fair representation must have occurred at the arbitration hearing. If there was no breach at those proceedings, they argue, the arbitrator's decision in favor of Kroger is final.[2] Thus, evidence of the Union's conduct prior to the arbitration hearing is irrelevant. Plaintiffs offer two theories in support of admitting this evidence. The Court finds merit in both of these theories and has therefore decided that evidence of the Union's prior conduct will be admitted.

I. Evidence of prior conduct to explain conduct at the arbitration.

Plaintiffs have claimed that the Union breached its duty of fair representation at the arbitration hearing. Plaintiffs can only succeed on this claim by showing that the union acted arbitrarily, discriminatorily, or in bad faith during its presentation of the plaintiffs case at those proceedings. *Vaca v. Sipes,* 386 U.S. 171, 190 (1967); *Ruzicka v. General Motors Corp.,* 523 F.2d 306, 309 (6th Cir. 1975), *cert. denied,* 104 S. Ct. 424 (1983).

In order to prove their claim, the plaintiffs have the right to introduce evidence that will allow the jury to determine the motives behind the Union's actions at the arbitration hearing. Evidence of the increasing hostility between the Union and the plaintiff group is relevant to this determination. *See Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America,* 469 F.2d 181 (4th Cir. 1972). Thus, the Court has decided to admit evidence of prior conduct which sheds light on the motives of the Union at the arbitration hearing.

Contrary to the fears expressed in defendants' briefs, this ruling by no means suggests that plaintiffs can prove a breach of the duty of fair representation merely by showing bad faith conduct outside the arbitration hearing. The jury will be carefully instructed that the plaintiffs must show not only that the Union proceeded in bad faith, but that the Union's misconduct at the arbitration hearing seriously undermined the arbitration decision. *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 568 (1976).

This theory for admissibility, however, does not justify admitting into evidence all union conduct prior to the

arbitration. It only justifies admission of evidence that serves to explain the Union's conduct at the arbitration. Plaintiffs' second theory, however, provides for the admissibility of a broader class of evidence.

II. Breach by conduct of union prior to arbitration

Plaintiffs argue that they have alleged a breach by the Union of its duty of fair representation that is independent of the alleged breach at the arbitration hearing. They contend that the Union breached its duty by failing to investigate fully the sales transaction, file promptly the grievances, and pursue vigorously those grievances. Because of what they believed to be an inadequate performance by the Union, plaintiffs felt compelled to devote considerable amounts of their own time, energy, and money to an attempt to preserve what they believed to be their contractual seniority rights. Plaintiffs maintain that they were damaged by the Union's breach to the extent of the expenses incurred in their own efforts to assert their contract rights. Thus, they contend, they are entitled to present evidence of all prior Union conduct to prove a breach independent of the breach which allegedly occurred at the arbitration.

Defendants vigorously argue that any breach by the Union of its duty of fair representation prior to the arbitration hearing is irrelevant. To recover against the Union, defendants argue, the plaintiffs must recover against the employer on the contract claim. Defendants point out that the only way plaintiffs can show a breach of the contract in this case is to show that the otherwise binding decision of the arbitrator was undermined by the Union's failure to fairly defend plaintiffs' rights. *Hines v. Anchor Motor Freight, supra* at 568.

This Court is of the opinion that the duty of fair representation is not defined so narrowly. Plaintiffs have cited cases in which courts have awarded damages against a union even when the employer was not found to be in breach of the labor contract. *Dutrisac v. Caterpillar Tractor Co.*, 511 F. Supp. 719 (N.D. Cal. 1983), *aff'd.* — F.2d —, 113 L.R.R.M (BNA) 3532 (9th Cir 1983); *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981); *Foster v. Bowman Transportation Co.*, 562 F. Supp. 806 (N.D. Ala. 1983). None of these cases deals with a situation where the union actually went to arbitration, as Local 406 did. Nevertheless, the Court finds valid the general proposition advanced by these cases. If a union fails to fairly represent the contractual rights of a group of employees, and its nonaction is either "arbitrary, discriminatory, or in bad faith," the employees are entitled to prevail against the union for expenses incurred in seeking a *fair* resolution of their claim, even if they do not prevail against the employer on the contract.[3]

Defendants have cited numerous cases for the proposition that the plaintiffs must prevail against the employer on the contract in order to prevail against the Union for a breach of the duty of fair representation. *See, e.g., St. Clair v. Teamsters Local 515*, 422 F.2d 128 (6th Cir. 1969); *Balliet v. Blue Ridge Pressure Castings, Inc.*, 572 F. Supp. 796 (E.D. Pa. 1983); *Kemp v. U.S. Postal Service*, 116 L.R.R.M. 2931 (E.D. Mich. 1984).

Although these cases appear, at first glance, to be at odds with those cited by plaintiffs, the Court has reconciled the cases by distinguishing the type of damages sought by the employees. The cases cited by defendants, which

emphasize that the employees cannot prevail against the Union without prevailing against the employer on the contract claim, appear to be contemplating back pay as a remedy. It is not disputed that the plaintiffs in this case will be precluded from recovering the typical compensatory relief of back pay if they do not prevail against Kroger.[4] In the cases cited by plaintiffs, however, where the employees were clearly seeking a damage award of attorney fees and costs, the courts were willing to allow that limited recovery against the union.

The Court is persuaded that the Union's duty of fair representation in cases where there has been an arbitration is not limited to its conduct at the arbitration hearing. The Union is the exclusive bargaining representative of these employees. Because it holds that exclusive position, it bears the responsibility of fairly representing the claims of all of its members in a manner that is not arbitrary, discriminatory, or in bad faith, *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). *See* 29 U.S.C. § 159 (1976). That duty of representation begins when the claims are presented to the Union by the members.

One thing that the jury will have to consider in this case is whether the plaintiffs' claims against Kroger were of any merit.[5] If they were not, the Union may succeed in showing that it did not arbitrarily fail to pursue them. If, on the other hand, the claims of the employees were not frivolous, the Court does not believe that the mere fact of the arbitration should cure the Union's past misconduct. If the jury finds a breach of the duty of fair representation, the Union should bear the expenses incurred by the plaintiffs in performing the job the Union should have been doing all along.

Defendants have also argued that, once there has been an arbitration hearing, the federal court has no jurisdiction to hear a claim of a breach of the duty of fair representation that occurred prior to the arbitration. The Court finds no merit in this argument.

As a general rule, the NLRB has exclusive jurisdiction over activities which are arguably protected by § 7 of the National Labor Relations Act (NLRA) or which constitute an unfair labor practice under § 8 of the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), however, created an exception to the general rule by granting federal courts jurisdiction over suits for violations of labor contracts. Section 301 also has been interpreted to give federal courts jurisdiction over claims of a union's breach of its duty to fairly pursue employees contract claims. *See Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 301-302 (1971).

In the present case, the plaintiffs have alleged a breach by Kroger of the collective bargaining agreement. They have also alleged that Local 406 has failed, from the grievance stage onward, to fairly represent their interests with respect to this contract claim. Thus, the Court concludes that plaintiff's claim falls within the grant of jurisdiction of section 301.[6]

CONCLUSION

For the above reasons, the Court will admit evidence of conduct of the Union prior to the arbitration hearing. It notes, however, that defendants remain free to challenge the admissibility of any evidence if they believe its probative value is outweighed by its prejudicial effect. Fed. R. Evid. 403.

Dated: September 11, 1984 /s/ Benjamin F. Gibson
U. S. District Judge

FOOTNOTES

[1] The Court has not made an effort in this opinion to identify which arguments were made by which defendants. Instead, all arguments are attributed to "defendants" generally.

[2] Whether or not the arbitrator's decision would be binding in favor of Hamady is disputed. Hamady did not take part in the arbitration proceeding. The Court expresses no opinion on this matter.

[3] The Court is not of the opinion that the plaintiffs, if they succeed in proving a breach by the Union, are entitled to compensation for *all* expenses incurred in this action. For example, if the Union did an adequate job of presenting the initial grievances, the plaintiffs should not be compensated for the expense of filing duplicative grievances. They should be compensated for the amount they expended to get a *fair* resolution of their claim less the value of the services actually rendered by the Union. Because the issues of liability and damages have been bifurcated in this action, these are questions, if reached at all, that will be resolved in the damage phase of this proceeding.

[4] Of the cases presented by defendants, *Balliet v. Blue Ridge Pressure Castings, Inc.*, 572 F. Supp. 796 (E.D. Pa. 1983), presents facts most similar to those before this Court. Two arbitration hearings were held in a matter involving a layoff dispute. Plaintiffs claimed that the Union breached its duty of fair representa-

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tion by failing to adequately represent their interests during the layoff dispute and at the first arbitration hearing. Plaintiffs did not dispute, however, that the Union did an adequate job of representing their interests at the second arbitration hearing where plaintiffs were also represented by their own counsel. The Court held that the second arbitration hearing "completely and irrevocably eradicated any lack of fair representation which might have occurred at the initial hearing." *Id.* at 798.

Balliet is distinguishable from the case before this Court. It appears from the facts recited that plaintiffs did not attempt to represent their own interests prior to or following the first arbitration hearing. Thus, even if there was a breach by the Union prior to the second arbitration hearing, the plaintiffs incurred no monetary harm. Although the plaintiffs did hire an attorney for the second arbitration hearing-they did not seek to prove a breach by the Union at that hearing. Thus, they would not be entitled to the expenses they incurred by supplying their own lawyer.

[5] Of course, the jury cannot use hindsight in favor of either party in its determination of whether the plaintiffs' claims were meritorious. It must evaluate those claims in light of what was known, or could reasonably have been discovered, by the parties at the time the dispute arose.

[6] Defendants have cited cases which held that a federal court did not have § 301 jurisdiction to hear a claim alleging a breach of the duty of fair representation. The Court notes that these cases involved disputes between the union and its employees, rather than disputes arising out of an employer's alleged violation of a collective bargaining agreement. *See, e.g., Haynes v. Consolidated Service Corporation,* 517 F.2d 564 (1st Cir. 1975) (court found as a fact that there was no collective bargaining agreement in effect); *Kupec v. Plumbers, Local 75,* 101 L.R.R.M. 3052 (E.D. Wis. 1979) (employee claimed that journeymen's union did not properly refer him for employment through its hiring hall procedures).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENNETH WOOD, et al.,

Plaintiffs,

v. File No. G80-742 CA

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,

Defendants,

and

HARRY HIGHT, et al.,

Plaintiffs,

v. File No. G83-727 CA

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,

Defendants. OPINION

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(Filed September 25, 1984)

This matter arose out of the transfer of a warehouse from Kroger Co. to Hamady Bros. Food Markets. After the transfer, Hamady reduced the operations of the warehouse and, consequently, reduced the number of employees.

Plaintiffs, a group which includes some employees not hired by Hamady and others who were hired but suffered a loss in wages and benefits, brought this suit under the jurisdictional provisions of § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1976). At the time of

the transfer, the plaintiffs were represented by General Teamsters Union, Local 406.

Plaintiffs suit includes three counts. Count I, against Local 406, alleges a breach of the duty of fair representation. Count II, against Kroger Company, alleges that Kroger breached the "successors and assigns" clause of its collective bargaining agreement with the employees by failing to require, as a condition of the transfer, that Hamady assume the collective bargaining agreement.

Count III, against Hamady Bros., is the subject of this motion to dismiss. Plaintiffs allege that, under the federal common labor law of "successorship," Hamady is bound by the substantive terms of the labor contract between Kroger and Local 406. They claim that Hamady has breached that contract by laying off employees out of line of seniority and/or discharging employees without just cause. Plaintiffs seek damages, apparently in the form of back pay, for those employees unjustly laid off and those employees who took cuts in pay and benefits when they went to work for Hamady.

Hamady Bros. moved for dismissal after the close of plaintiffs' case. Hamady argues that, although the case as a whole is being tried to a jury, Count III is a non-jury issue. Therefore, it argues that a motion to dismiss under Fed. R. Civ. P. 41(b) is appropriate, rather than a motion for a directed verdict.

When plaintiffs filed their complaint in this action, they made a demand for a jury trial. Defendants Kroger Co. and Local 406 opposed that demand. In its June 27, 1983 order, this Court applied the rationale of *Ross v. Bernhard*, 396 U.S. 531 (1970), and held that plaintiffs

had a right to a jury trial on the counts against the Kroger Co. and the Union. It noted that Count II against the Kroger Co. was in the nature of a breach of contract claim, a claim traditionally tried to a jury. Analogizing the duty of fair representation claim to a common law tort claim, the Court held that the plaintiffs also had a right to a jury trial on Count I. The Court did not address the issue of whether Count III was subject to a jury trial.

Hamady argues that Count III is a non-jury issue, claiming that there is no precedent for trying such a case to a jury. Plaintiffs claim that, although a successorship claim is not normally tried to a jury, the unique procedural context of this case has turned it into a jury issue. They cite *Scott v. Anchor Motor Freight*, 496 F.2d 276 (6th Cir.), *cert. denied* 419 U.S. 868 (1974), for the proposition that, in the context of a case involving an alleged breach of a union's duty of fair representation, a jury may hear claims that would traditionally be heard by an arbitrator.[1]

The issue whether Count III is a jury or non-jury claim is relevant only to the extent that it affects the standard to be applied by this Court in reviewing the evidence. If Count III is a non-jury issue, under Rule 41(b), the Court may dismiss the claim if "upon the facts and the law, the plaintiff has shown no right to relief." *See* Fed. R. Civ. P. 41 advisory committee note on the 1946 amendment ("as the judge is the trier of facts . . . his function is not the same as on a motion to direct a verdict . . . the judge in deciding such a motion in a non-jury case may pass on conflicts of evidence and credibility"). If the motion is treated as one for a directed verdict in a jury case,

under Rule 50(a), the Court may only grant the motion if, viewing the evidence and all inferences properly deducible therefrom in the light most favorable to the plaintiff, there are no controverted issues of fact upon which reasonable persons could differ. *See Campbell v. Olivia,* 424 F.2d 1244, 1245 (6th Cir. 1970); *see also Savage v. Christian Hospital Northwest,* 543 F.2d 44 (8th Cir. 1976).

After a thorough review of the evidence presented in plaintiff's case, the Court has determined that it need not decide whether Count III presents a jury or non-jury issue. Even using the stricter standard of scrutiny required when considering a motion for a directed verdict, the Court has concluded that the plaintiffs have not made out a case against Hamady.

I. FINDINGS OF FACT

Set forth below are general findings of fact that serve as the background of the Court's decision. In the following section, specific findings relating to each substantive claim of the defendant's motion are incorporated into the Court's discussion of those claims.

The plaintiffs are former employees at a warehouse located on Shaffer Road in Kentwood, Michigan. The warehouse was formerly operated by The Kroger Company. In 1979, Local 406 entered into a collective bargaining agreement with Kroger covering employees at the warehouse. The agreement went into effect on October 7, 1979, and was to continue in effect through October 9, 1982.

Among the provisions of the Kroger-Local 406 collective bargaining agreement were provisions protecting se-

niority rights, establishing wages, and providing benefits. Section 1.3 of the Kroger-Local 406 contract provided that the agreement "shall be binding not only upon the parties hereto but upon their successors and assigns."

As early as May 1980, Kroger had discussions with the Union concerning the possible sale of Kroger stores in western Michigan and possible sale of the Shaffer Road warehouse. In August of 1980, Kroger entered into an agreement with Hamady to transfer operation of the warehouse to Hamady. Hamady ultimately assumed operation of the warehouse in October of 1980. Prior to Hamady's assumption of operations, there were approximately 199 employees working at the warehouse in various job categories. When Hamady assumed operations, it employed approximately 99 employees, all of whom were selected from the existing Kroger workforce.

The warehouse transfer was accomplished by a sale of assets. Although the Kroger-Hamady transfer documents are described as "lease" agreements, they in fact provide for a purchase by Hamady after a set length of time. The warehouse "lease" provides for purchase of the warehouse at the end of seven years. The equipment "lease" provides for a purchase of the equipment at the end of thirty-six months. The transaction included a direct sale of 20 tractors, 25 dry grocery semi-trailers, and 20 refrigerator trailers. The transfer agreement also provided for purchase of the warehouse inventory after expiration of a service agreement between Kroger and Hamady, an agreement with a duration of several months.

There was no evidence that Kroger and Hamady are anything but unrelated corporate entities. Nor was there

any evidence that the transfer of the Kentwood warehouse was not an arms length transaction. Hamady's purchase of the warehouse from Kroger was preceded by its purchase of 21 Kroger stores in the western Michigan area. Kroger, after these transactions, ceased to do business in the western Michigan area.

Before the actual transfer of the warehouse, Kroger personnel assumed a limited role in Hamady's hiring process. Kroger personnel posted notices of job opportunities with Hamady. Some evidence suggests that Kroger supervisors may have advised Hamady as to which employees to hire. Interviews, lasting five to ten minutes, were conducted at the Kroger warehouse. The interviews were conducted entirely by Hamady personnel.

Hamady posted notice of its selections shortly before it assumed operation of the warehouse. A number of persons who were not selected had more seniority on the Kroger warehouse seniority list than persons who were selected. As well as the seniority provision, the wage and benefit terms of the Kroger-Local 406 contract were not honored by Hamady Bros. when it assumed operation of the Kentwood warehouse.

On Friday, October 18, 1980, Kroger closed the Kentwood warehouse. On Monday, October 20, 1981, Hamady opened the warehouse and began its operations. There is no evidence suggesting that Kroger did not relinquish ownership and control of the warehouse when it closed its operations on October 18, 1980.

The major difference between the Kroger and Hamady regimes was the reduction in operations and workforce brought about by Hamady. Although there were no major

changes in the activities of the Kentwood warehouse after Hamady assumed control, there were minor changes in many areas. Many of the job classifications remained the same, but there were fewer workers in each job classification. Truck drivers changed their routes because fewer stores were being supplied by the warehouse. Except for testimony that Hamady discontinued operation of a banana ripening room, there was no testimony of any physical alteration to the warehouse. During the time Hamady operated the Kentwood warehouse, it used the warehouse to supply Hamady grocery stores.

Several witnesses testified that the Kroger name had not completely vanished from the warehouse. Some of the trailers associated with the warehouse continued to bear the Kroger name. It is not clear from the testimony whether these trailers were actually in use by Hamady. Others did bear the Hamady name. The warehouse continued to process Kroger brand name products that were being sold at the Hamady stores. There was no evidence that Hamady's sale of Kroger products was anything but an arms length business deal.

On October 27, 1980, Jeff Fansler filed a grievance against Hamady. That grievance alleged that Hamady had violated the Kroger-Local 406 contract by not honoring seniority, wages, benefits and other employment terms of the Kroger-Local 406 contract. The grievance filed by Fansler, after some dispute, was subject to arbitration. Arbitrator Robert Howlett determined, after four days of hearings, that the grievance had no merit.

On September 29, 1980, Local 406 began formal contract negotiations with Hamady. Hamady and Local 406

entered into a collective bargaining agreement covering the workers at the Kentwood warehouse on December 10, 1980, effective October 19, 1980. In October of 1981, Hamady ceased operating the Kentwood warehouse.

II. THE MERITS OF THE MOTION

Under federal common law, there are three circumstances in which a new employer might be held to the terms of the former employer's collective bargaining agreement. First, the new employer may be found to be the "alter ego" of the predecessor. Second, the new employer may be found to have expressly or impliedly assumed the obligations of the predecessor's contract. Finally, a court may find that there is a "substantial continuity" in the business enterprises and that the new employer is obligated to arbitrate under the terms of the previous employer'e contract.

A. The "alter ego" test

A new employer may be held to the terms of its predecessor's contract when it is found to be an "alter ego" of the former employer, a mere "disguised continuance of the old employer." *Howard Johnson Co., Inc., v. Detroit Local Joint Executive Board,* 417 U.S. 249, 259 n.5 (1974). The Supreme Court has noted that this analysis applies in cases that "involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." *Id.; see also General Teamsters, Chauffeurs and Helpers, Local Union No. 249 v. Bill's Trucking, Inc.,* 493 F.2d 956, 962 n.32 (3d Cir. 1974).

This analysis is apparently borrowed from the law of corporations, where the courts will sometimes "pierce the corporate veil" in order to prevent fraud, illegality, or injustice. *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879, 886 (3d Cir. 1984); *Carpenters' District Council of Western Pennsylvania v. W. O. Kessel Co., Inc.*, 487 F. Supp. 54, 57 (W.D. Pa. 1980). As in the corporate context, the "alter ego" remedy in federal labor law has a limited application.

Plaintiffs argue that Kroger's continuing interest in the warehouse as a lessor, its service agreements with Hamady, and its agreement to sell Kroger products to Hamady indicate that it was the "alter ego" of Hamady. Plaintiffs support their "alter ego" characterization by noting a significant continuity in the operations of the warehouse.

The Court finds that this evidence is not sufficient to prove that Hamady is the "alter ego" of Kroger. The evidence supports Hamady's characterization of the warehouse transfer as a bona fide, arms length transaction. Kroger and Hamady were two distinct corporate entities. There is no evidence that they were owned by the same stockholders. Nor is there evidence that, after the sale, Kroger had any involvement in the operation of the warehouse. Moreover, the evidence does not suggest that this is a case where the transaction was arranged with the purpose of avoiding the effect of the labor laws.

B. The "express or implied assumption" test

Hamady would be held bound by the Kroger-Local 406 agreement if, under a contractual analysis, it could be said

to have expressly or impliedly assumed the contract. The Court concludes that Hamady did not assume the contract.

Plaintiffs presented no evidence of an express assumption by Hamady. There was evidence that Donald Hirsch, of Kroger, encouraged Hamady Bros. to accept the Kroger-Local 406 contract. Yet nowhere in the transfer documents between Kroger and Hamady is there any mention of an assumption of the contract. *See American Bell, Inc. v. Federation of Telephone Workers,* 736 F.2d 879, 884 (3d Cir. 1984).

Several witnesses were asked to characterize the comments of Hamady personnel at the August 7 meeting with the warehouse employees. In each case, the testimony was that Hamady officials gave equivocal answers. The impression retained by the employees was that the issue of the extent to which Hamady might honor the Kroger-Local 406 contract was, at best, still subject to negotiation.

Plaintiffs have argued that Hamady impliedly assumed the contract. They acknowledge that the "successors and assigns" clause could not, of its own force, bind Hamady to the contract. They argue, however, that, in light of Hamady's knowledge of the existence of the clause, the Court should construe Hamady's silence as an acceptance. *See Howard Johnson, supra* at 258 n.3 (stating that an employer is not bound by a successor and assigns clause when it makes it "perfectly clear" that it refuses to assume any obligations under the agreement).

The Court notes that, even if silence *could* be construed as acceptance in this context, Hamady was not silent for long. At the September 27 meeting of Local 406 with the warehouse employees, Norman Griffin of

Hamady stated that Hamady would not adopt the Kroger contract and would not hire in order of seniority. This position, if not made clear to the employees before this meeting, had apparently been made clear to the Union officials. Moreover, Hamady entered into negotiations with Local 406 prior to the actual warehouse transfer. This conduct cannot be construed as anything but an express renunciation of any obligation under the Kroger-Local 406 contract.

C. The "substantial continuity" test

Plaintiffs also argue that Hamady is bound under federal common law, as a successor employer, to the Kroger contract. Plaintiffs assert that there is a "substantial continuity" of business operations and that the balance of competing employer and employee interests weighs in favor of imposing the Kroger contract on Hamady.

Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249 (1974), is the Supreme Court's most recent opinion dealing with the "substantial continuity" test. In that case, the Court held that there was no "substantial continuity" of operations when a franchisor purchased the restaurant and motor lodge assets of its franchisee and resumed operations with a workforce of 45 employees, nine of whom were employees of the former owner.

Plaintiffs argue that, under the facts of this case, *Howard Johnson* is not controlling. Instead, they urge the Court to apply the analysis of *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). That case involved the merger of a small corporation into a larger corporation. The Court held that the surviving corporation, which had

hired all of the merged corporation's employees and continued to operate the enterprise in a substantially identical form, had a duty to arbitrate under the merged corporation's collective bargaining agreement.

If there is one thing that can be gathered from these two Supreme Court opinions, it is the fact that the application of the "substantial continuity" test is extremely fact specific. Both plaintiffs and Hamady have seized the particular facts of these cases and argued forcefully for and against successorship liability of Hamady.

Plaintiffs point out that Hamady hired a majority of the Kroger workforce. As in *Wiley,* Hamady continued substantially the same operations of the warehouse. Hamady hired supervisory personnel who had worked for Kroger and continued many employees in the same jobs they had held with Kroger. Further, they point out that there was no hiatus in the operation of the warehouse; Kroger ceased operations on a Friday, and Hamady began operations on Monday.

Defendant has argued, however, that there are significant differences between the facts of *Wiley* and those in this case. The Court finds those distinctions to be controlling.

Unlike *Wiley,* which involved a corporate merger, in this case, Hamady acquired Kroger by a purchase of its assets. One significance of this fact is that Kroger did not disappear. If the employees had a grievance against Kroger for breach of its collective bargaining agreement, they were not deprived of their remedy. As the Supreme Court noted in *Howard Johnson:*

> . . . the disappearance of the original employing entity in the *Wiley* merger meant that unless the

> union were afforded some remedy against Wiley, it would have no means to enforce the obligations voluntarily undertaken by the merged corporation, to the extent that those obligations vested prior to the merger or to the extent that its promises were intended to survive a change of ownership. Here, in contrast, because the Grissom corporations continue as viable entities with substantial retained assets, the Union does have a realistic remedy to enforce their contractual obligations.

Howard Johnson, supra at 257. In Count II of this action, plaintiffs have preserved whatever remedy they have under their contract by suing Kroger for a breach of that agreement.

In *Howard Johnson,* the Supreme Court also distinguished *Wiley* by noting that it occurred "against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation . . . which suggests that holding Wiley bound to arbitrate under its predecessor's collective-bargaining agreement may have been fairly within the reasonable expectations of the parties." *Howard Johnson, supra* at 257. In contrast, Michigan law provides for no such assumption of obligations by a purchaser of assets. *See Chase v. Michigan Telephone Co.,* 121 Mich. 631 (1899).

Although plaintiffs have correctly pointed out that Hamady continued to operate the warehouse in substantially the same manner as had Kroger, their analysis misses one factor that the Court deems to be significant: operations of the warehouse, although similar, were reduced across the board. Instead of serving 35 stores, the warehouse under Hamady only served 21. Personnel were ap-

parently cut from all job classifications. Delivery routes were rearranged and consolidated. In *Wiley*, a small publishing company was merged into a growing conglomerate. In this case, Hamady acquired the assets of a company that was operating at a loss. The economic position of Wiley and Hamady are not comparable.

Finally, the court must consider these factors in light of the policies that underlie *Howard Johnson*, *Wiley*, and other decisions in the successorship area. As first described in *Wiley*, in fashioning the federal common law of successorship, the courts must balance the "rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers against the need for some protection to the employees from a sudden change in the employment relationship." *Wiley*, *supra*, at 549.

The facts of this case suggest that the balance should be struck in favor of the employer. Evidence was presented that suggested that Kroger had been losing money in its western Michigan operations for a number of years. Hamady acquitted the stores and warehouses knowing that it would have to make substantial changes in order to make profit. If Hamady had expected to have to assume the Krog r-Local 406 contract, it is likely that it would not have gone through with the transfer. The Court notes also that Hamady did not ignore the interests of the employees that it did hire. Instead, it began almost immediately to bargain with Local 406. As the Supreme Court noted in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972):

> A potential employer may be willing to take over a moribund business only if he can make changes in cor-

> porate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. . . . Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

For the above reasons, the Court holds that Hamady is not bound by the terms of the Kroger-Local 406 contract. Hamady's motion to dismiss is hereby granted.

Dated: September 25, 1985

/s/ Benjamin F. Gibson
U.S. DISTRICT JUDGE

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[1] Upon close analysis of the arguments of plaintiffs and defendants, the Court has concluded that they are in basic agreement on one thing—that the Court must make some initial determination of Hamady's liability on the Kroger contract. Plaintiffs, in their trial brief, suggest that, as in the typical case when a court is ordering arbitration, the Court must make an initial determination as to "whether substantial *enough* continuity exists to order . . . arbitration." Thus, the plaintiffs apparently concede that, until this determination is made, there is no jury question.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENNETH WOOD, et al.,

Plaintiffs,

v. File No. G80-742 CA

GENERAL TEAMSTERS UNION
LOCAL 406, et al.,

Defendants,

HARRY HIGHT, et al.,

Plaintiffs,

v. File No. G83-727 CA

GENERAL TEAMSTERS UNION
LOCAL 406, et al.,

Defendants. OPINION

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(Filed February 28, 1985)

In 1980, the Kroger Company began pulling its business operations out of the western Michigan area. As part of that pullout, it ceased operating a local warehouse and transferred the warehouse assets to Hamady Brothers Food Markets. Hamady continued to operate the warehouse as a food distribution center but reduced the level of operations and, consequently, the number of employees. Although Hamady hired solely from the Kroger workforce, it hired only one-half of the Kroger employees and did not hire those employees by seniority.

Plaintiffs, a group which includes some employees not hired by Hamady and others who were hired but suffered

a loss in wages and benefits, brought this suit against the Kroger Company, Hamady Bros., and the General Teamsters Union Local No. 406, the bargaining representative for the Kroger employees and later for the Hamady employees. Plaintiffs claim that: 1) Kroger was obligated by a "successors and assigns" clause of its labor contract to require, as a condition of the sale of assets, that Hamady assume the collective bargaining agreement; 2) that Hamady was obligated to accept the collective bargaining agreement; and 3) that Local 406 breached its duty of fair representation to plaintiffs by failing, before and during the arbitration utimately held to resolve these issues, to represent adequately their interests. The Court bifurcated the trial, trying first the issues of liability. The case on damages has not yet been tried.

After a six week trial on liability, the jury returned a verdict in favor of plaintiffs, against Kroger and Local 406.[1] Answering the interrogatories of the special verdict form supplied to them, the jury found that the Union violated its duty of fair representation to the plaintiffs by conduct occurring before and during the arbitration. It found that the Union's violation of its duty had undermined the integrity of the arbitration process. Having thus decided that the arbitration process was tainted, the jury went on to resolve the issue that had been before the arbitrator, whether Kroger had violated the successors and assigns clause of the collective bargaining agreement. The jury found that Kroger had violated that clause and had thus breached the collective bargaining agreement.

Kroger and Local 406 have filed motions for a new trial and, in the alternative, for a judgment notwithstand-

ing the verdict. As discussed below, the motions are denied.

I. MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT

The jury was asked to answer seven interrogatories regarding the liability of Kroger and of Local 406. It responded to each question in favor of plaintiffs. Kroger and the Union argue that there is insufficient evidence to support the jury's response to any of the questions.

A judgment notwithstanding the verdict should be granted only when the evidence is such that there can be but one reasonable conclusion as to the proper verdict. It should not be granted when there is a conflict in the evidence. Credibility of evidence is not to be considered. In sum, if there is sufficient evidence to raise a question of fact for the jury, JNOV is improper. *National Polymer Products v. Borg-Warner Corp.*, 660 F.2d 171, 178 (6th Cir. 1981). The Court finds, under this standard, that ther is sufficient evidence to support each finding of the jury.

A. Union's Breach of its Duty Apart from the Arbitration.

1. *Duty with respect to Hamady.*

In Question 1.A. of the special verdict form, the jury was asked:

> Did the Union violate its duty of fair representation by its conduct apart from the arbitration hearing with respect to the claims against Hamady?

The jury answered "yes."[2]

The Court finds that there is sufficient evidence of record upon which the jury could have based this conclusion.[3] Plaintiffs attempted at trial to show that the Union breached its duty in two respects: first, the Union failed to quickly and forcefully pursue whatever legal rights it had against Hamady, and second, it failed to fairly represent the desires of its membership when it negotiated a new contract with Hamady. A good deal of evidence was presented regarding the care, or lack of care, with which the Union and its counsel investigated whether they had any legal rights against Hamady. The Union ultimately concluded that it had no legal recourse and, instead, would have to bargain a new contract. Testimony revealed that the Local began negotiations with Hamady without notice to the Kroger employees. There was evidence from which the jury could have inferred that the Union meant to exclude certain Kroger employees from the bargaining team. Although testimony was conflicting, the jury could also have concluded that the Union ignored the bargaining unit's concern over seniority rights and dropped its demand that Hamady hire by seniority early in the bargaining process. Further testimony was elicited from which the jury could have inferred that the reason the Union dropped the seniority demand was because it was more interested in guarding its pension fund. Thus, the Court finds sufficient evidence to support the jury's answer to Question 1.A.

Shamblin v. General Motors Corp., 743 F.2d 436 (6th Cir. 1984), cited by the Union, is not to the contrary. In *Shamblin*, the court held that a union did not breach its duty of fair representation by failing to secure, through collective bargaining negotiations, retroactive seniority

for a group of employees. Both *Shamblin* and the case at issue grew out of circumstances where unions had to decide whether the desires of one group of employees were consistent with the good of the bargaining unit as a whole. As noted in *Shamblin,* the duty of fair representation does not prevent a union from making a good faith choice between the needs and desires of one employee group and what it perceives to be the needs of the entire bargaining unit. Indeed, a union has great discretion in deciding how to handle such conflicts. Yet, there is one basic limitation. The union may not decide which claims to pursue for reasons that are "arbitrary, discriminatory, or in bad faith." *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 309 (6th Cir. 1975), *cert. denied,* 104 S. Ct. 424 (1983). It does not appear that the Sixth Circuit intended, in *Shamblin,* to overrule this basic precept.

Looking at the evidence as a whole and resolving credibility questions in favor of plaintiffs, the Court concludes that there was sufficient evidence from which the jury could have inferred that the union in this case pursued a course contrary to the interests of plaintiffs for reasons that were either arbitrary, discriminatory, or in bad faith. To prove that the Union's conduct was arbitrary, plaintiffs presented evidence that the Union failed to move to protect their interests during the time period when the transfer of the warehouse was being contemplated by Kroger. They also elicited testimony suggesting that the Local subsequently failed to actively pursue any means of recourse against Kroger or Hamady until the plaintiffs obtained their own lawyer and began seeking legal remedies themselves. Plaintiffs also presented evidence of a discriminatory motive or bad faith. Testimony

regarding the tensions that developed between the Local and the plaintiffs was, in many cases, conflicting. Among other things, the jury could have concluded that the Union purposefully excluded one plaintiff who was a union steward from the team that negotiated the Hamady contract, that the Union denied plaintiffs the opportunity to speak at union meetings, that union members turned on lawn sprinklers to douse plaintiffs while they were picketing the union hall, and that the Secretary-Treasurer of the Union characterized plaintiffs to a news reporter as employees with bad work records.

In Instruction No. 14, the Court carefully explained to the jurors the meanings of the words "arbitrary, discriminatory, and in bad faith."[4] The Jury was also instructed that "the union does not violate its duty of fair representation because it has refused to take some action requested by one of its members or because it has made a mistake" and that "a union is afforded a wide range of reasonableness and the union's representation is not expected to be error free."[5] The Court can only conclude that the jury faithfully applied these instructions in deciding that the conduct proven at trial was indeed arbitrary, discriminatory, or in bad faith.

2. *Duty with respect to Kroger.*

In Question 1.B. of the special verdict form, the jury was asked:

> Did the Union violate its duty of fair representation by its conduct apart from the arbitration hearing with respect to the claims against Kroger?

The jury answered "yes."

Again, the Court finds that there is sufficient evidence upon which the jury could have based this conclusion. Evidence was presented suggesting that the Local failed to press Kroger to make accepting the collective bargaining agreement a term of its sale of the warehouse to Hamady. Similarly, there was evidence that the Union failed to pursue quickly its contractual rights by filing a grievance against Kroger. When the plaintiffs in this case sought to obtain a temporary restraining order to prevent the transfer of ownership of the warehouse, the Local opposed their motion. Although the Union presented testimony in the course of the trial detailing its reasons for each of its actions, the Court cannot decide as a matter of law that these reasons negate the claimed breach of the duty of fair representation. Rather, it was for the jury to determine whether the Unon's conduct, as a whole, amounted to a breach of that duty.

B. Union's Breach of its Duty During the Arbitration.

In question 2.A. of the special verdict form, the jury was asked:

> Did the Union violate its duty of fair representation by its conduct during and related to the arbitration hearing with respect to the claims against Hamady?

The jury answered "yes." In question 2.B., the jury was asked:

> Did the Union violate its duty of fair representation by its conduct during and related to the arbitration hearing with respect to claims against Kroger?

The jury answered "yes."

The record contains sufficient evidence to support the jury's findings that the Union violated its duty of fair representation during the arbitration hearing. Admitted as exhibits were the entire transcripts of the four days of arbitration hearings held in this case. In addition, the parties introduced as separate exhibits those portions of the transcript that they particularly wanted to bring to the attention of the jury. Among the events detailed in the transcript are instances where the Union attorney attempted to impeach witnesses called by the plaintiffs and where he objected to evidence offered by the plaintiffs. At one point, the Union offered into evidence a file which contained a letter from the Union attorney advising the Union that the claims against Hamady had no chance of success and the claims against Kroger had only a fifty percent chance. Further, there was evidence that the Union attorney was uncertain as to the specific language of the successors and assigns clause of the Kroger contract.

The Union's argument that there were reasons for each action that it took during the course of the arbitration is not relevant to the Court's decision on the judgment notwithstanidng the verdict. The Union had the opportunity at trial to convince the jury that it took the actions that it did for reasons that were not arbitrary, discriminatory, or in bad faith. The Court is not at this point sitting as a trier of fact. Instead, it must determine whether there was sufficient evidence upon which the jury could have based its conclusion that the Union breached its duty. Based on the above cited evidence, the Court finds that there is sufficient evidence of record to support the jury's conclusion.

The Court is not persuaded by defendants' argument that there can be no breach of the duty of fair representation because plaintiffs had their own lawyer at the arbitration hearing. The defendants suggest that, if the Union lawyer failed to perform adequately at the arbitration hearing, the plaintiffs' own lawyer could have remedied his neglect. Plaintiffs' theory in this case, however, was not that the Union *failed* to act in plaintiffs' behalf at the arbitration. Rather, their theory is that the Union attorney undermined their case by *affirmative* acts such as objecting to their evidence and impeaching their witnesses. The Court does not see how the presence of plaintiffs' own counsel could remedy the kind of breach alleged in this case. The presence of plaintiffs' counsel at the arbitration was one factor before the jury for consideration. It is not itself dispositive on the question whether the Union breached its duty.

Nor is the Court persuaded by defendant's argument that there can be no breach because the arbitration occurred under order of the Court. Defendants cite no legal authority for the proposition that plaintiffs waived their right to challenge the validity of the arbitration by failing to come to this Court for injunctive relief during the arbitration hearing itself. The Court will not assume such a waiver.

The Union objects particularly to the jury's answer to Question 2.A., finding that the duty of fair representation was breached with respect to the claims against Hamady. The argument it advances has some initial appeal. The Union notes that, at all times that the contractual claim against Hamady was being pursued through arbitra-

tion, all parties recognized that it had merit only if Hamady was bound to assume the Kroger collective bargaining agreement. The Union was advised in September of 1980 by its counsel that, based on his understanding of the law, there was no viable claim against Hamady. This Court determined in September of 1984 that the claim against Hamady had no merit. *Wood v. International Brotherhood of Teamsters*, slip op. (W.D. Mich., Sept. 25, 1984). How then, the Union asks, can the jury find that the Union breached its duty of fair representation by failing to pursue a nonmeritorious claim?

Before answering that question, the Court notes that this is not a case where plaintiffs asked the union to pursue a frivolous claim. As the Court stated in its opinion granting the motion to dismiss, the case law establishing when a new employer is or is not bound by the previous employer's contract gives no easy answers. *Id.* at 13. Rather, the courts must closely analyze the facts of each case. In 1980, when the Union decided whether to pursue vigorously its claim against Hamady, the case law was even less clear than it is today.

The answer to the Union's question is that the Union was obligated to *fairly* represent plaintiffs and to treat their concerns in a manner that was not arbitrary, discriminatory, or in bad faith. In determining whether the Union treated plaintiffs fairly, neither the Court nor the jury should apply hindsight to decide whether or not a claim was meritorious. Instead, the issue is whether, under the circumstances as they existed at the time, the Union treated plaintiffs' grievance against Hamady fairly. The jury concluded that the Union made the decision not

to pursue vigorously the claims against Hamady in a manner that was arbitrary, discriminatory, or in bad faith. Based on the evidence summarized above, the Court finds that the jury's conclusion is supported by substantial evidence.

C. Serious Undermining of the Arbitration Process.

In Question 3.A., the jury was asked:

> If your answer to Question 2A was "yes," did such violation seriously undermine the integrity of the arbitration process as that process related to the claims against Hamady?

The jury answered "yes." In Question 3.B., the jury was asked:

> If your answer to Question 2B was "yes," did such violation seriously undermine the integrity of the arbitration process as that process related to the claims against Kroger?

The jury answered "yes."

The Union and Kroger both argue that the jury's verdict must be overturned because there is no direct evidence that the arbitration was tainted. Defendants characterize plaintiffs' case as one built on speculation. Plaintiffs, they argue, have merely asked the jury to speculate on how the results of the arbitration might have been different; they have not offered any direct proof that the arbitration was undermined.

As defendants point out, arbitration awards deserve great deference. Courts

> should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen

> by the parties finally to settle their disputes. Otherwise, "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 . . . (1960).

Hines v. Anchor Motor Freight, Inc., 424 U.S 554, 563 (1976).

The burden of proving that an arbitration award should be overturned is high, even in a case like that at bar, where plaintiffs urge that the union's violation of its duty of fair representation tainted the arbitration process. In *Hines*, the Supreme Court held that, under certain circumstances, a union's breach of its duty of fair representation leads to an exception to the general rule of finality of arbitration awards. The Court held that the union's breach of its duty

> relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it *seriously undermines* the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract.

Id. at 567 (emphasis supplied). Thus, in addition to proving that the Union breached its duty of fair representation at the arbitration hearing by conduct that was arbitrary, discriminatory, or in bad faith, plaintiffs must show that the breach was such that the arbitration process was seriously undermined.

The Court instructed the jury that they would have to find that the arbitration process was seriously undermined in order to overturn the decision of the arbitrator.

Instruction No. 19 explained that, to show that the Union's breach seriously undermined the integrity of the arbitration process, "the plaintiffs must show that the arbitration process was seriously flawed and that the arbitration fundamentally malfunctioned in a way that denied the plaintiffs a fair and adequate hearing." Thus, when applying the law to the facts, the jury applied a strict standard.

Kroger and the Union, in effect, argue that the Court should impose a higher standard and conclude as a matter of law that there was insufficient evidence to support the jury's verdict. Defendants argue that plaintiffs must produce *direct evidence* to show that the Union conduct *caused* the arbitrator to decide as he did. It is not clear how the defendants define "direct" evidence, but they appear to argue that the verdict cannot stand because of the plaintiffs' reliance on two kinds of evidence. First, they note that plaintiffs introduced evidence of events that occurred at the arbitration and left to the jury to infer that these events caused the arbitrator to decide as he did. Defendants argue that plaintiffs' case cannot be based on this sort of circumstantial evidence. Second, they argue that a verdict cannot be based upon the expert testimony offered by plaintiffs to describe how a hypothetical arbitrator would respond to the conduct of the Union. The Court rejects these arguments.

Although the burden of proving that the arbitration process was undermined is high, the Court will not place an insurmountable burden on plaintiffs. One of plaintiffs' theories in this case was that the Union representatives signaled the arbitrator by their conduct in the hear-

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ing that they did not, in fact, support plaintiffs' claims. Plaintiffs argued to the jury that, if the arbitrator knew that the Union was only going through the motions of the arbitration hearing, and only begrudgingly asserting the claims of plaintiffs, the arbitrator would be inclined to resolve the case against plaintiffs. An expert presented by plaintiffs as well as one presented by defendants, both experienced arbitrators, testified that it would be conceivable that an arbitrator would follow such "signals" in deciding a case. Given this as plaintiffs' theory, the Court must ask how any plaintiffs would be able to prove such a claim through the kind of "direct evidence" for which defendants are calling. Is an arbitrator going to write an opinion stating that he or she was influenced by such signals? The Court notes that circumstantial evidence is generally admissible and sees no reason why it should not be equally admissible to prove this kind of claim.[6]

Further, because a jury will never know what motivated an arbitrator to reach his or her decision, the jury must apply some kind of objective standard. In effect, the jury must answer the question whether the Union's representation was so unfair that a typical arbitrator would not have been able to render a decision that did justice to plaintiffs' claims. Thus, the Court concludes that expert testimony relating to how a typical arbitrator functions is, by necessity, an acceptable form of proof. *See Bowen v. United Postal Service*, 642 F.2d 79, 84 (4th Cir. 1981), *rev'd on other grounds*, 103 S.Ct. 588 (1983).

The issue before the Court at this point is whether there was sufficient evidence of record, whether circumstantial or direct, to justify the jurors' finding that the

Union's conduct at the arbitration substantially undermined that process. The Court concludes that there was. The jury had the entire transcript of the four day arbitration hearing as an exhibit. In addition, as previously described, it had excerpts of that transcript highlighting particular portions. To aid the jury, three expert witnesses were called to testify as to their impressions of particular portions of the hearing. Further, the jury listened to the Union attorney explain why he took the actions that he did during the arbitration proceedings. The Court therefore concludes that there was sufficient evidence to support the jury's finding that the arbitration process was undermined.[7]

D. Breach of Contract.

In Question 4. the jury was asked

> Did Kroger violate the successors and assigns clause by transferring the warehouse to Hamady without requiring Hamady to assume the collective bargaining agreement as a condition of the sale?

The jury answered "yes."

Both plaintiffs and defendants took the position at trial that the "successors and assigns" clause of the Kroger contract had a plain, unambiguous meaning. Plaintiffs argued that the plain meaning of "successor" was its common meaning and that Kroger was obligated to ensure that any employer who succeeded Kroger in operating the warehouse would accept the contract. Defendants argued that the plain meaning was the shifting legal meaning of the word "successor" in the federal labor law context. Thus, to define "successor," defendants argued that the parties had to look to the relevant case law.

The Court determined at trial that the meaning of the successors and assigns clause was ambiguous. Thus, the interpretation of that clause became a question of fact for the jury. *See Scott v. Anchor Motor Freight, Inc.*, 496 F.2d 276 (6th Cir.), *cert. denied*, 419 U.S. 868, 977 (1974). Admittedly, the evidence presented at trial regarding the interpretation of the clause was sparse. The Court concludes, however, that the jury's decision is supported by substantial evidence.

Although the relevant collective bargaining agreement was negotiated in 1979, the parties presented no direct evidence regarding the intent of the parties who actually negotiated that contract. Apparently, the critical "successors and assigns" language was not a subject of negotiation at that time. It appears that the successors and assigns language had remained unchanged in the Kroger-Local 406 contract since 1961. Thus, the jury was deprived of any direct evidence of the intent of the parties to the 1979 contract.

Evidence was presented, however, from which the jury could infer the intent of the parties. Kroger submitted as exhibits copies of proposals presented by the Teamsters to Kroger during negotiations on the national level in 1961 and 1964. Defendants elicited testimony suggesting that the fact that these proposals for more inclusive "successors and assigns" language were not adopted showed that the parties could not have intended the clause to apply to the kind of asset transfer that took place in this case. Plaintiffs elicited testimony explaining that it is sometimes the practice of parties negotiating a contract to incorporate into the contract a shorter clause that is understood

by the parties to include the principles of the longer, proprosed language.

Further, the parties produced evidence of conduct of both the Union and Kroger subsequent to negotiation of the successors and assigns clause to show how the parties themselves interpreted the contract. *See* 17 Am. Jur. 2d *Contracts* § 250, at 643 (1964). Although these portions of evidence were subject to differing interpretations by the parties, resolution of the conflicting interpretations is a matter for the jury, not for the judge.

Finally, parties elicited testimony to aid the jury in determining what would be a reasonable interpretation in this particular context. Plaintiffs elicited testimony regarding the general purpose and effect of successors and assigns clauses. Defendants called witnesses who explained the changing meaning of "successor" in the context of federal labor law and explained why, under Kroger's proposed interpretation, the clause did not apply to a transfer of assets. *See* 17 Am. Jur. 2d *Contracts* § 252, at 644-45 (1964). Thus, the Court concludes that there was sufficient evidence to support the jury's affirmative response to Question 4.

In summary, the Court finds that there was sufficient evidence to support the seven findings of the jury on the issue of liability. The motions of Kroger and Local 406 for a judgment notwithstanding the verdict are denied.

II. MOTION FOR A NEW TRIAL

Both defendants have moved for a new trial on the grounds that two documents which had not been admitted into evidence were inadvertently sent to the jury room for

use by the jury during deliberations. The Court finds that the presence of the two exhibits with the jury during deliberations amounts to harmless error and therefore denies the motions.

A. Background

The jurors in this case were each given looseleaf notebooks in which copies of exhibits admitted into evidence were placed. Counsel agreed to this procedure prior to trial in order to assist the jury in understanding the many exhibits that would be admitted in the lengthy trial. Two sets of notebooks were given to the jury. One set contained exhibits of plaintiffs and the Union; the other set contained exhibits of the Kroger Company.

Counsel initially handed copies of the exhibits to jurors as the exhibits were admitted into evidence. During the course of trial, counsel adopted the procedure of introducing an exhibit into evidence and, instead of giving it to the jurors at that time, adding the copies to the jurors' notebooks when trial concluded for the day.

After the proofs were closed, counsel agreed that the jurors should be permitted to take the notebooks back into the jury room with them, along with the official exhibits. Although counsel and the deputy clerk examined the official exhibits, counsel agreed among themselves that it would not be necessary to examine the notebooks.[8]

After the jury deliberated and rendered its verdict in favor of plaintiffs, the deputy clerk discovered that one of the jury notebooks in the jury room was opened to exhibit 122.1, a document that had not been admitted into evidence. Later, it was determined that exhibit 122.1 and

exhibit 97, neither of which had been admitted into evidence, were contained in all six sets of notebooks that were taken to the jury room for deliberations.

1. *Exhibit 122.1*

Exhibit 122.1 consists of pages ten through twelve of the arbitration transcript of September 23, 1981. The entire transcript of the four day arbitration hearing was admitted into evidence early in the trial. In order to accentuate certain portions of the transcript, plaintiffs also introduced selected excerpts of the transcript, such as exhibit 122.1.

At the point in the arbitration proceeding recorded in Exhibit 122.1, the Union's attorney was examining Kenneth Wood, a plaintiff in this case. The testimony involved notes that Wood had made regarding a conversation with Fritz Wegelman, a foreman at the Kroger warehouse. Wood testified that Wegelman was speaking to him at that time "as a friend," not as a supervisor. According to Wood's arbitration testimony, Wegelman said that, if Wood continued to make trouble, "the Kroger Company could mess up [his] records and make it very difficult ever finding another job," and, knowing "how [the Teamsters' Union] could play," that he could get "hurt" by the Union.

Earlier during the trial, the Court excluded direct testimony from plaintiff Wood regarding this conversation with Wegelman. Without deciding whether the evidence was hearsay, the Court ruled that the testimony was excludable under Federal Rule of Evidence 403 because it was more prejudicial than it was probative.

Later, plaintiffs sought to introduce exhibit 122.1, the portion of the arbitration transcript detailing the same conversation. The exhibit was offered in conjunction with fifty-four other excerpts of the arbitration transcript in order to show the misconduct of the Union at the arbitration hearing. In the portion of the transcript highlighted by exhibit 122.1, counsel for the Union appears to be attempting to impeach plaintiff Wood regarding his notes of the conversation with Wegelman.

Objections were raised by both the Union and Kroger, challenging exhibit 122.1 as hearsay and as highly prejudicial, and thus excludable, under Federal Rule of Evidence 403. A sidebar conference was called and the Court took the matter under advisement. When asked for clarification on the record, plaintiffs' counsel explained that the exhibit was not being offered a substantive proof of the conversation, unless the Court determined that it was an admission attributable to Kroger. Rather, plaintiffs primarily offered it, along with the other excerpts, to show the misconduct of the Union at the arbitration. Later, counsel for Kroger made a motion to strike pages ten through twelve of the September 23 arbitration transcript, which had already been admitted into evidence without objection. On the last day of proofs, without any ruling from the Court on either the admissibility of exhibit 122.1 or the motion to strike, plaintiffs' counsel agreed that he would not refer to exhibit 122.1 during his closing arguments. Counsel did not ask the Court to rule on the pending matters before the case was sent to the jury.

2. *Exhibit 97.*

Exhibit 97 is a letter sent by plaintiff Wood to Robert Holmes, then vice-president of the Teamsters Joint Coun-

cil 43. Wood complained in the letter that he and other union members did not believe that Local 406 was fairly representing their interests. Among other things, he explained that the Local 406 attorney worked with Kroger and Hamady, against the dissident plaintiff group, to get the injunction barring the transfer of the warehouse lifted.

Plaintiffs offered exhibit 97 into evidence early in the course of the trial. When met with a hearsay objection, they withdrew the exhibit. The Court did not rule on its admissibility.

B. Standard to be Applied

Defendants strenuously argue that, under Sixth Circuit precedent, the presence of exhibits 97 and 122.1 in the jury room created a presumption that the jury's verdict was prejudiced by those exhibits. Defendants rely on a line of cases beginning with *Stiles v. Lawrie,* 211 F.2d 188 (6th Cir. 1954), which held that

> [r]eceiving incompetent documents by a jury requires that the verdict be set aside, unless entirely devoid of any proven influence or the probability of such influence upon the jury's deliberations or verdict. . . . It is not for the court to say whether there was sufficient evidence adduced at trial to justify the finding of the jury, and that the evidence improperly received by them could have had no influence on the verdict. This is purely a matter of fact and not within the province of the court to determine, for the law has no criterion by which to know or ascertain the effect which the improper evidence may produce upon the verdict. When improper evidence, that may have prejudiced the case, has been received by the jury, the law will so presume.

Id. at 190.[9] *See also Overbee v. Van Waters & Rogers*, 706 F.2d 768, 771 (6th Cir. 1983); *In re Beverly Hills Fire Litigation*, 695 F.2d 207, 214 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

Plaintiffs, on the other hand, argue that the standard to be applied can be no stricter than the "harmless error" standard set forth in Federal Rule of Civil Procedure 61. Rule 61 provides that

> (n)o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court, at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The Court agrees with plaintiffs that the harmless error standard of Rule 61, rather than the *Stiles* "presumption of prejudice" test, is the appropriate standard to apply. The factor that distinguishes the *Stiles* line of cases from this case is that, in each of the *Stiles* cases, the jury obtained unadmitted evidence through juror misconduct. It did not obtain the evidence through error of the court or parties. In *Stiles* itself, one of the jurors brought into the jury room a manual published by the state highway department purporting to show speeds at which cars were traveling based on skid marks made by the cars. In *Beverly Hills Fire Litigation, supra,* a juror performed an experiment at home to assess plaintiff's theory that a fire may have been started because of faulty aluminum

wiring. In *Overbee v. Van Waters & Rogers, supra,* a juror looked through his son's electric welding manual to determine what safety precautions plaintiffs should have taken.

The Court finds the distinction between juror misconduct and error by the parties to be dispositive for two reasons. The first is based on the language of Rule 61. The second is based on practical considerations.

Rule 61, by its own terms, applies only to error "by the court or any of the parties." The *Stiles* cases did not involve error of the court or parties, but misconduct of a juror. Thus, Rule 61 did not apply and a different standard was fashioned by the courts. This case, on the other hand, involves error by the parties. Thus, Rule 61 provides the governing standard and the *Stiles* cases are inapplicable.

There are practical reasons why a presumption of prejudice is appropriate in cases of juror misconduct but not in cases of error by the parties. As noted by the Sixth Circuit, other jurors are more likely to be swayed by a fellow juror's evidence than by evidence presented by the parties. *See United States v. Pennell,* 737 F.2d 521, 533 n.11 (6th Cir. 1984), *cert. denied,* 105 S. Ct. 906 (1985). In this case, there is less reason to be concerned that the jurors might have given significant weight to two out of two hundred exhibits than there would be if the two exhibits had been brought into deliberations by jurors themselves. Further, if a juror brings additional evidence into the deliberative process, counsel for the parties are deprived of any opportunity to oppose the jury's reliance on that particular evidence. In this case, the parties had

control at least to the extent that they had the opportunity to examine the jury notebooks before they were removed to the jury room.

The Court's conclusion that the harmless error standard, rather than the presumption of prejudice test, applies is confirmed by consideration of an analogy. The analogy assumes that the Court admitted both exhibit 97 and 122.1 over objection at trial. It assumes further that the Court determined, on a motion for a new trial, that its previous evidentiary rulings were in error. In that case, the fact that the jury had viewed the improperly admitted exhibits would not be sufficient reason to grant a new trial. There would be no "presumption of prejudice;" instead, the party moving for a new trial would have to prove under Rule 61 that the Court's failure to grant a new trial would be inconsistent with "substantial justice." If that is the result achieved when a document reaches the jury through an evidentiary error of the court, the Court sees no reason why a stricter standard should apply when the same evidence reaches the jury through the kind of inadvertence that occurred in this case.[10]

C. Application to the Facts

Given that the appropriate standard in this case is the "harmless error" standard of Rule 61, the Court concludes that a new trial is not warranted. Exhibits 122.1 and 97 are only cumulative of the evidence that was properly before the jury. The remaining evidence was itself sufficient to support the jury's findings. Thus, denial of the motions for a new trial is not "inconsistent with substantial justice." Fed. R. Civ. P. 61.

1. *Exhibit 122.1*

Defendants object to exhibit 122.1 because they feel the jury could have concluded from Wood's purported conversation with Wegelman that Kroger and the Union were large, powerful organizations willing to operate outside the law to achieve their aims. The Court does not agree that, when read in its entirety, exhibit 122.1 would leave such an impression with the jury. Wegelman does not appear to be speaking as a representative of Kroger, but "as a friend" of Wood. The conversation describes only his opinion of what Kroger and the Union might do to Wood. It is by no means a threat; nothing in the conversation suggests that he was speaking on behalf of either Kroger or the Union.

To the extent, however, that exhibit 122.1 is prejudicial, its prejudicial effect is diminished by the fact that the exhibit is only cumulative of other evidence that was properly before the jury. It is cumulative in two respects.

First, it is cumulative in the sense that the exact same document was already in evidence in the form of pages ten through twelve of the September 23 arbitration transcript. Because defendant Kroger never pursued its motion to strike, the complete arbitration transcript was available for the jury's perusal during its deliberations.

Second, it is cumulative in the sense that other evidence spoke to the same theme. For example, with respect to the Union, plaintiffs presented evidence that Union officials may have turned on lawn sprinklers to douse plaintiffs, that union officers were hostile toward plaintiffs in Union meetings, and that the secretary-treasurer of the Union spoke disparagingly to the press of plaintiffs' work

records. Although not as strongly worded, other evidence portrayed Kroger in a similar manner. Witnesses testified that Kroger was the secod largest grocery retailer in the country and that Kroger was perceived by the Teamsters as a tough opponent in the bargaining process. Moreover, some evidence suggested that Kroger worked with the Union, against plaintiffs, in facilitating the transfer of the warehouse from Kroger to Hamady.

The Court must also look to the relevance of the exhibit to the issues determined by the jury. With respect to the Union, the evidence presented by exhibit 122.1 was arguably relevant to a central issue in the case, whether the Union was acting in bad faith. Thus, the Court must examine with great care whether, given all the other evidence, the presence of exhibit 122.1 was so prejudicial as to result in substantial injustice. As discussed above, the Court concludes that it was not.

Exhibit 122.1 was not, however, particularly relevant to any claim against Kroger. Kroger's good or bad faith was not an issue for the jury's determination. The jury was only asked to interpret the successors and assigns clause and decide whether Kroger had breached that clause.

2. *Exhibit 97*

Defendants argue that exhibit 97, a letter from plaintiff Wood to Robert Holmes, is a highly prejudicial, self-serving summary of hearsay and conjecture. The Court finds that the letter is not so prejudicial as to require a new trial. Plaintiff Wood, who wrote the letter, was a key witness in this case and testified for the better part of three days. In the Court's opinion, there is nothing in

exhibit 97 that did not already come into evidence through Wood's direct testimony.

The Court finds that the presence of exhibits 97 and 122.1 in the jury room during deliberations was not so prejudicial as to result in substantial injustice to the parties. Accordingly, defendants' motions for a new trial are denied.

Dated: February 28, 1985

/s/ Benjamine F. Gibson
U. S. DISTRICT JUDGE

FOOTNOTES

[1] At that point, Hamady Bros. was no longer a part of the case. The Court granted Hamady's motion to dismiss at the close of plaintiffs' proofs. *Wood v. International Brotherhood of Teamsters*, Nos. G80-742 and G83-727, slip op. (W.D. Mich. Sept. 25, 1984).

[2] With respect to Question 1.A., the Union argues that, if the Union's breach of duty with respect to the employee's claims against Hamady is actionable at all, it is actionable only by Hamady employees. The Court rejects this argument for two reasons. First, until the Kroger warehouse closed on October 18, 1980, the union owed a duty of fair representation to all the Kroger employees. The plaintiffs have alleged that the duty included the obligation to persuade Hamady to accept the Kroger contract or to convince Kroger to require Hamady to accept the contract. Second, some plaintiffs in this case were in fact employees of Hamady and thus able to press the issue even under the Union's theory.

[3] Although no single act may have itself constituted a breach of the Union's duty of fair representation, the jury was instructed that they were to weigh the evidence as a whole in deciding whether the duty had been breached. Jury Instruction No. 17. *See Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 618 (9th Cir. 1981); *Smith v. Hussman Refrigerator Co.*, 619 F.2d 1229, 1243 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980).

4 Instruction No. 14 read as follows:

A union breaches its duty of fair representation when the union's conduct is arbitrary, discriminatory, or in bad faith. I will explain to you the meaning of each of these terms.

To act arbitrarily means to act perfunctorily and without heed or regard as to the merits of a particular matter. To act in a perfunctory manner is to act in a mechanical, indifferent, careless, and superficial way. Arbitrary also means not governed by principle, but acting according to preference, notion, whim, or caprice. Arbitrary action is unreasonable action taken without consideration and in disregard of the facts and circumstances.

Action is not arbitrary when exercised reasonably, or according to judgment or reason as dictated by legitimate interests of the union and its members. Neither carelessness, inadvertence, mere negligence, nor errors in judgment constitute arbitrary conduct.

To act discriminatorily means to act unfairly as to one person or group of persons as compared with others similarly situated. In the context of this claim, the union has breached its duty of fair representation only if it discriminated against plaintiffs in a hostile or invidious manner.

To act in bad faith is to act with improper intent, motive, or purpose. Bad faith encompasses fraud, dishonesty, and other intentionally misleading conduct. Proof that a union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation.

5 Instruction No. 13 read as follows:

The law provides that a union, which is the exclusive bargaining representative of a defined group of employees, has a statutory duty to fairly represent those employees in enforcing a collective bargaining agreement which governs the terms and conditions of their employment. This "duty of fair representation" extends to the processing of a grievance through the initial stages of the grievance procedure and also extends to the union's representation during arbitration. The duty also applies when a union undertakes to negotiate a contract on behalf of a defined group of employees.

Generally, speaking, the union does not violate its duty of fair representation because it has refused to take some action requested by one of its members or because it has made a mistake. A union is afforded a wide range of reasonableness and the union's representation is not expected to be error free.

At the same time, the union's discretion is not without limits. The doctrine of fair representation includes a statutory obligation to serve the interests of all members in a manner that is not arbitrary, discriminatory, or in bad faith.

The union has the authority to take action which it believes to be in the best interest of the group as a whole, even if that action is to the disadvantage of some individual members, subject always to the duty to avoid conduct that is arbitrary, discriminatory, or in bad faith.

[6] Kroger argues that, while plaintiffs were permitted to build a case on circumstantial evidence, Kroger was denied the one piece of direct evidence that would have convinced the jury that the case was not undermined, the decision written by Arbitrator Howlett. In his opinion, which is 82 pages long, the arbitrator details his findings of fact from the arbitration hearings, thoroughly analyzes the law, and reaches two major conclusions. He concludes that Kroger was not bound by the successors and assigns clause to require Hamady to assume the contract and that Hamady was not bound as a "successor" under the contract. He also, at one point in his opinion, concludes that the Union did not breach its duty of fair representation.

The Court determined that the opinion as a whole was inadmissible under Fed. R. Evid. 403. The opinion was excluded because it provided findings of fact based on evidence that was different from the evidence that this jury heard in court and because it detailed legal opinions on the ultimate issue in the case. The Court found that the prejudicial effect of these conclusions of the arbitrator outweighed the minimal probative value of introducing the opinion to show it was "well-reasoned." Although the opinion as a whole was inadmissible, the Court instructed counsel that, to the extent the opinion spoke specifically to an issue in controversy, the Court would consider permitting reference to that particular item of the opinion. Further, the jury was advised of the results of the arbitration, that the arbitrator ruled that Kroger did not violate the collective bargaining agreement. Instruction No. 24.

[7] The Union again argues that the finding of the jury regarding the claims against Hamady cannot be reconciled with the Court's decision to dismiss Hamady from the suit. As discussed above, the jury was not asked to apply hindsight or to determine whether the arbitration results with respect to Hamady were correct. Essentially, the jurors were asked whether, based on the conduct of the Union at the arbitration, the arbitration process and the arbitration decision were trustworthy. Their answer was that they were not.

The fact that Hamady was dismissed is not relevant to the issue of liability, but it is relevant to the issue of damages. Because the Hamady claim was ultimately found to be meritless, plaintiffs are precluded from any recovery against Hamady for back pay. That judgment dismissing Hamady, however, does not preclude an award against the Union for consequential damages caused by the Union's failure to fairly represent the plaintiffs at the arbitration hearing. *See Wood v. International Brotherhood of Teamsters*, 593 F. Supp. 355, 358-59 (W.D. Mich. 1984).

[8] Prior to instructing the jury, the following dialogue took place outside the presence of the jury:

> MR. KOLENDA: Your Honor, I think I'm representing what everyone has agreed to. We weren't quite sure when your clerk asked us this morning how we had originally proposed it. Subsequently, I think we have all agreed that it would be—no one would object, in fact, it would be a good idea administratively for the jury to take the jury books into the jury room. There is nothing in there that's not a official exhibit.
>
> Our thinking was that if they only had the official exhibits, that's one thing to be passed around six people. And while someone wants to read it, they may have to wait until someone else is finished with it. We talked about sending in one set of the jury books, but that only means two out of six can be looking at it at one time.
>
> Given the amount of things that there are to look at and the potential length of deliberations, if they have all have of them to be looking at simultaneously while talking, that may not only improve the quality of their deliberations, but it might also speed them up substantially.

If I can remember correctly, we agreed that they can have all the exhibits as they were introduced, the plaintiffs' and the defendants'.

MR. QUIST: That's correct.

THE COURT: Mr. Smith.

MR. SMITH: That's correct.

THE COURT: I would leave it to counsel to insure that all of the exhibits are in those books. So to the extent that some exhibits are missing, it will be the responsibility of counsel to see they're there.

MR. KOLENDA: Fine.

Just prior to sending the exhibits to the jury room, the Court addressed counsel:

THE COURT: I would ask counsel to work with the clerk to insure that the exhibits are—all the exhibits that have been duly admitted are together. To the extent that an exhibit does not get to the jury room, that will be the responsibility of counsel to insure, working with the clerk, that all exhibits are given to the jury that have been admitted.

[9] Contrary to plaintiff's argument, the Court does not believe that *United States v. Pennell,* 737 F.2d 521 (6th Cir. 1984), *cert. denied,* 105 S. Ct. 906 (1985), explicitly overruled *Stiles. Stiles* addressed the question of juror misconduct. *Pennell* addressed cases dealing with unauthorized communications by third parties with jurors.

[10] A close examination of Sixth Circuit case law suggests that this distinction is appropriately drawn. In *Blackmon v. United States,* 474 F.2d 1125 (6th Cir.), *cert. denied,* 414 U.S. 912 (1973), the deliberating jury requested a copy of a map which had been marked for identification but not admitted into evidence. The Court, on its own motion, decided to send the map to the jury room. In that case, the Sixth Circuit did not say it was applying a "presumption of prejudice" standard. Rather, it appears that the burden of proving prejudice remained with the party who moved for a new trial. Similarly, in footnote 12 of *In Re Beverly Hills Fire Litigation, supra,* the Court considered a case much closer to the case at bar than

that discussed in the text of the opinion. Footnote 12 describes a second piece of extraneous evidence that was improperly before the jury in that case, a publication that had been ruled inadmissible as hearsay. A copy of the publication was inadvertently admitted as part of a deposition to which it was appended. In dicta, the Court noted that an "examination of the document in question convinces us that the inadvertent introduction of the document was not prejudicial as it was probably more damaging to the defendants than to the plaintiffs." Again, in a case where juror misconduct was not involved, the Sixth Circuit made no mention of a "presumption of prejudice" standard.

RECOMMENDED FOR FULL TEXT PUBLICATION

See, Sixth Circuit Rule 24

Nos. 85-1880/1963/1964

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH WOOD, JEFFERY FANSLER, CHARLES BOHNER, et al.,
Plaintiffs-Appellants, (85-1880)
Respondents-Appellees, (85-1963/64),

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, et al.,
HAMADY BROS., FOOD MARKETS, INC.,
Defendants-Appellees, (85-1880)

KROGER COMPANY,
Petitioner-Appellant, (85-1963),

GENERAL TEAMSTERS UNION LOCAL 406,
Petitioner-Appellant, (85-1964).

ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed December 15, 1986

Before: KEITH and KENNEDY, Circuit Judges; and CONTIE, Senior Circuit Judge.

KENNEDY, Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. CONTIE, Senior Circuit Judge, (pp. 20-22) delivered a separate concurring opinion.

KENNEDY, Circuit Judge. Petitioners-appellants Kroger Company ("Kroger") and General Teamsters Union Local 406 ("the Union") appeal from a jury verdict and various interlocutory orders entered by the District Court for the Western District of Michigan in an action brought by respondents-appellees, former employees of Kroger, ("plaintiffs") under Section 301(a) of the Labor Management Relations Act. Plaintiffs appeal from the District Court decision granting the motion of defendant-appellee Hamady Brothers Food Markets ("Hamady") to dismiss. The plaintiffs' action before the District Court was based on three claims: 1) breach of the duty of fair representation by the Union; 2) breach of the collective bargaining agreement ("the contract") by Kroger; and 3) successor liability of Hamady. For the reasons stated below, we affirm the District Court's dismissal of Hamady and reverse the Court's denial of Kroger's, and the Union's motions for judgment notwithstanding the verdict.

I. FACTS AND PROCEEDINGS BELOW

Plaintiffs' action arose out of Kroger's lease/sale of one of its warehouses to Hamady. Plaintiffs, 38 former Kroger warehouse employees, only one of whom was hired by Hamady, were represented by the Union at the time of the transfer.[1] The terms and conditions of their em-

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[1]The one employee hired by Hamady alleged a loss of wages and benefits.

ployment were controlled by a collective bargaining agreement between Kroger and the Union. Section 1.3 of the contract provided that "[t]his Agreement shall be binding not only upon the parties hereto but upon their successors and assigns." Collective Bargaining Agreement, Joint Appendix at 557. The agreement also established a grievance procedure, which was the exclusive mechanism for resolving disputes over the interpretation or application of the contract. The final, and binding, step of the procedure was arbitration. *Id.* at 564.

Kroger is an Ohio corporation, with operations in twenty-four states. In the spring of 1980, Kroger decided to sell its Michigan stores because they were not profitable. Arrangements were made to sell the stores to Hamady. On August 6, 1980, Hamady and Kroger entered into a separate agreement regarding the warehouse. The agreement provided that Kroger would lease the warehouse to Hamady for seven years, at the end of which time Hamady would purchase the warehouse. Kroger would also lease the equipment in the warehouse to Hamady for thirty-six months, with the provision that Hamady would purchase the equipment at the end of that period. Finally, Kroger and Hamady entered into a service agreement under which Hamady would provide Kroger stores with groceries and produce until October 4, 1980, with renewal options which could extend until January 3, 1981.

During the negotiations between Hamady and Kroger, Kroger representatives notified Hamady representatives of the collective bargaining agreement, and particularly of the successors and assigns clause. Mr. Hirsch, a Kroger representative, informed the Hamady representatives that

the warehouse employees were a good group of people and that the dealings with the Union had been good. Joint Appendix at 824-25. A Union official testified that, in turn, Mr. Hirsch told the Union official that he did not think there would be a problem in terms of Hamady's assumption of the contract. In a letter dated September 23, 1980, a Union official informed Kroger that if Hamady did not assume the contract, the Union would hold Kroger responsible for any damages to the employees.

At the time of the announcement of the lease/sale to Hamady, the Union met with Hamady officials to determine the effect of the transfer on the employees. There was some discussion of the seniority rights of the employees. In a meeting on September 15, 1980, Mr. Griffin, a Hamady official, stated in response to Union inquiries that Hamady intended to do its hiring exclusively from the Kroger employee roster. Hamady officials understood that Kroger was happy with its workforce at the warehouse. Mr. Griffin also told the Union that Hamady would make an effort to take seniority into consideration. At the same meeting, the Hamady officials informed the Union representatives that they would not accept the collective bargaining agreement. *Id.* at 379-80. In a letter dated September 22, 1980, the attorney for the Union acknowledged to the Union that Hamady was probably not bound by the Kroger contract. Joint Appendix at 861-62.

The sale of the warehouse was announced to the employees in a meeting held on August 7, 1980. On September 27, 1980, a second meeting was held in order to answer questions regarding the employees' contract. At this meeting, Mr. Griffin, the Hamady official, informed the em-

ployees that Hamady would not adopt the contract and would not necessarily hire in order of seniority. Thereafter, the warehouse employees were interviewed and given physical examinations. Hamady posted the list of employees who would be hired. Hamady hired approximately half of the employees of the warehouse, but did not do so in order of seniority. On October 20, 1980, Kroger ceased operations at the warehouse and transferred the assets to Hamady.[2]

Hamady did recognize the Union as the exclusive bargaining agent for its new employees. After the meeting on September 27, Hamady officials engaged in bargaining with the Union. A new agreement governing the warehouse employees was reached on November 10 and ratified on November 22. The new collective bargaining agreement included many of the same provisions as the previous contract.

In early October, a former employee filed a grievance with the Union, claiming that Kroger and/or Hamady had violated the collective bargaining agreement. On that same day, the Union filed a grievance asserting that the agreement should be binding on Hamady and that Kroger had the obligation to see that Hamady assumed the contract. These grievances were denied at the Step 1 and Step 2 grievances. In addition to their request that the Union file a grievance, the employees requested that the Union seek an injunction against the transfer of the warehouse. Judge Hoffius of the Kent County, Michigan, Circuit

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[2]Due to unfavorable economic conditions, Hamady ceased operations one year later in October of 1981.

Court initially entered a temporary restraining order, but the order was later dissolved.

The employees filed suit in the Kent County Circuit Court on October 16, 1980, claiming that: 1) the Union had breached its duty of fair representation, 2) Kroger had breached the collective bargaining agreement by failing to bind Hamady to the collective bargaining agreement, 3) Hamady was liable as a successor to Kroger, and 4) Hamady had discriminated against the employees on several different bases. The discrimination claims were severed and are not at issue here. Kroger and the Union removed the case to the District Court. When the representatives hearing the Step 3 grievance deadlocked, Kroger demanded a rehearing on this step of the grievance procedure. The Union, however, refused to participate because it contended that such a rehearing was not authorized. In February, 1981, the Union filed a motion to compel Kroger to arbitrate the grievances. The District Court ordered Kroger and Hamady to arbitrate the issues. It also ordered that the interested employees be allowed to provide a spokesperson of their own to participate in the arbitration proceedings. The Court retained jurisdiction of the case pending completion of the arbitration process.

The arbitration hearing lasted four days. Plaintiffs were represented by their own attorneys, who participated fully in the hearing. Thus, they presented witnesses and evidence, cross-examined the witnesses of the other parties, and submitted briefs. The arbitrator chosen by the parties was Robert Howlett, an experienced and respected arbitrator. On January 8, 1982, he issued an opinion finding that Hamady was not a "successor" to Kroger and

thus was not obligated to arbitrate, and that Kroger was not obligated to require Hamady to assume the contract. The arbitration award was binding, in accordance with the collective bargaining agreement.

After the arbitration award was issued, plaintiffs filed a motion for trial in the District Court. Kroger moved to strike plaintiffs' jury demand on the ground that a jury trial is not available in a hybrid section 301 action. The District Court denied this motion. In response to other motions, the Court also refused to certify the action as a class action and refused to permit the arbitrator to testify at the trial. It also rejected Kroger's motion for summary judgment.

The liability issues were bifurcated and tried first. During the trial, the plaintiffs offered evidence presented by Professor Summers, a labor law professor with experience arbitrating. This testimony was admitted over the objections of both Kroger and the Union. The witness presented evidence that an arbitrator may be influenced by signals given out by a union indicating that the union does not want to win the case. Joint Appendix at 355-63. The District Court refused to admit into evidence the arbitrator's decision and award although it did permit testimony relating to them.

Hamady moved for dismissal after the plaintiffs had presented all of their proof. Its motion was granted. The District Court found that Hamady was not a "successor" to Kroger, and was not obligated to assume the collective bargaining agreement. District Court Opinion, Joint Appendix at 197. Plaintiffs appeal from this dismissal. The District Court denied Kroger's motion to

dismiss on the ground that the expert witness presented evidence that the Union's conduct may have affected the arbitrator's decision, thus making it vulnerable.

The District Court submitted the following special interrogatories to the jury:

> 1. A. Did the Union violate its duty of fair representation by its conduct apart from the arbitration hearing with respect to the claims against Hamady?
>
> B. Did the Union violate its duty of fair representation by its conduct apart from the arbitration hearing with respect to the claims against Kroger?
>
> 2. A. Did the Union violate its duty of fair representation by its conduct during and related to the arbitration hearing with respect to the claims against Hamady?
>
> B. Did the Union violate its duty of fair representation by its conduct during and related to the arbitration hearing with respect to the claims against Kroger?
>
> 3. A. If your answer to Question 2A was "yes," did such violation seriously undermine the integrity of the arbitration process as that process related to the claims against Hamady?
>
> B. If your answer to Question 2B was "yes," did such violation seriously undermine the integrity of the arbitration process as that process related to the claims against Kroger?
>
> 4. Did Kroger violate the successors and assigns clause by transferring the warehouse to Hamady without requiring Hamady to assume the collective bargaining agreement as a condition of the sale?

Joint Appendix at 215-16. The District Court instructed the jury that if it found that the Union had breached its

duty and that that breach had undermined the arbitration process, it should determine whether Kroger breached the collective bargaining agreement. The jury found both that the Union had breached its duty and that that breach had undermined the arbitration process. It then found that the collective bargaining agreement obligated Kroger to require Hamady to assume the agreement.

Kroger and the Union both moved for judgment notwithstanding the verdict, or, in the alternative, a new trial. The District Court denied these motions. District Court Opinion, Joint Appendix at 218. It stated that there was sufficient evidence to show that the Union had breached its duty, both apart from and during the arbitration hearing, and that this breach had undermined the entire arbitration process. Furthermore, the Court found that the jury's interpretation of the term "successor" was supported by the evidence. On the petition of Kroger and the Union, the District Court certified the following five questions pursuant to 28 U.S.C. § 1292(b):

> 1. Whether the Court properly ruled that plaintiff had a right to a jury trial in this case;
>
> 2. Whether, given the Court's determination that Hamady was not a successor under federal labor law, the jury could properly find a breach by the union of its duty of fair representation with respect to Hamady;
>
> 3. Whether there can be any recovery for Union conduct apart from the arbitration hearing regarding claims against Kroger or against Hamady;
>
> 4. Whether the jury was properly instructed regarding the standard that must be met by plaintiffs before the jury could find that the arbitrator's decision should be set aside; and

5. Whether the Court properly instructed the jury regarding the jury's interpretation of the Kroger-Local 406 contract.

Joint Appendix at 258.

This Court granted permission to appeal. These claims of Kroger and the Union, as well as plaintiffs' appeal from the dismissal of Hamady, are now before us.

II. HAMADY'S DISMISSAL

At the close of plaintiffs' case, the District Court granted Hamady's motion for dismissal, finding that plaintiffs had not "made out a case against Hamady." District Court Opinion at 4, Joint Appendix at 200. The Court found no evidence to indicate that Hamady was an alter ego, that Hamady had assumed the collective bargaining agreement, or that there was common ownership or control of the two companies. The Court found, "[e]ven using the stricter standard of scrutiny required when considering a motion for a directed verdict," that Hamady was not bound by the collective bargaining agreement. *Id.* We affirm the judgment of the District Court.

The Court addressed in turn each of the three exceptions to the general rule that a new employer cannot be held to the terms of a former employer's collective bargaining agreement. First, the Court found that Hamady was not an "alter ego" of Kroger. The United States Supreme Court has stated that a new employer may be bound by the terms of the former employer's contract if the new employer is found to be "merely a disguised continuance of the old employer." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974)

(citing *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). An "alter ego" will be found only in cases "involv[ing] a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws." 417 U.S. at 259 n.5. The District Court correctly found that this case is not such a case and that the two corporations are "distinct corporate entities." District Court Opinion at 10, Joint Appendix at 206.

The District Court next considered whether Hamady had expressly or impliedly assumed the contract. The Court found that Hamady's answers to the employees' questions regarding its assumption of the contract were equivocal at best. In addition, "even if silence *could* be construed as acceptance in this context, Hamady was not silent for long." District Court Opinion at 12, Joint Appendix at 208. In fact, plaintiff Wood admitted in the verified complaint he filed with the Circuit Court for Kent County that Hamady had announced it would not adopt the contract: "Notwithstanding the successors and assigns clause of the labor Contract . . . , Hamady has stated that it will not adopt the Contract." Joint Appendix at 35. The District Court found that plaintiffs did not present any evidence to indicate assumption of the contract, and that in fact, Hamady had expressly renounced the agreement.

The third circumstance in which a new employer may be held bound by its predecessor employer's contract is where there is "substantial continuity" of business operations, resulting in successor liability on the part of the new employer. Three Supreme Court cases address successor-

ship in this context. *See Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974); *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972); *John Wiley and Sons, Inc., v. Livingston*, 376 U.S. 543 (1964). These cases must be read together to understand the distinguishing criteria in this area. The District Court found that, under these three cases, Hamady was not liable as a successor.

In *Wiley*, a union brought an action to compel arbitration under a collective bargaining agreement adopted by the predecessor company. The new company had acquired the original company by merger. On these facts, the Supreme Court held that "the disappearance by merger of at corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement." *Wiley*, 376 U.S. at 548. The Court limited this holding when it stated: "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives." *Id.* at 551. Where there is a lack of "substantial continuity of identity in the business enterprise," the Court acknowledged that the duty to arbitrate may not survive. *Id.*

In *Burns* a corporation that had been providing security services was replaced by a corporation that had submitted a lower bid. The new employer hired twenty-seven of the original forty-two guards and brought in fifteen of its own. The case arose in the context of an unfair labor practice charge as opposed to an action to compel arbitration. The Court held that the successor employer had a duty to recognize and bargain with the

union representing the original employees, but did not have an obligation to adopt the contract provisions. The Court stated that, where the majority of employees after the change had been previously employed by the predecessor employer, the new employer must bargain with the union. *Id.* at 281. In refusing to hold the successor employer bound by the prior agreement, the Court pointed out a significant difference between *Burns* and *Wiley*: "Its [*Wiley's*] narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation." *Id.* at 286.

Finally, in *Howard Johnson,* the Court addressed a situation in which the successor employer had not hired a majority of the original employees and the change of ownership was by means of a purchase of assets rather than a merger. The Court held that, under *Wiley,* there was no substantial continuity of identity in the business enterprise and thus no duty to arbitrate. *Howard Johnson,* 417 U.S. at 263-65. In addition to the failure of the successor to hire a majority of the original employees, the Court emphasized the differences between a merger and a purchase of assets. First it stressed that the original employer fails to exist when two companies are merged, making it impossible for the employees to find relief if they cannot turn to the successor. Second, the Court mentioned that in the case of a merger, state law usually provides that the surviving corporation will assume the original company's obligations. *Id.* at 257-58. After *Howard Johnson,* there must be continuity in terms of both the workforce and the operations in order to find successor liability under the collective bargaining agreement.

The District Court correctly observed that the application of the "substantial continuity" test is fact specific. Joint Appendix at 209. Although Hamady did hire fifty-one percent of the former Kroger employees, the Court found, on the basis of the facts of the case now before this Court, that the distinctions between this case and *Wiley* were controlling. The Court stressed the facts that Kroger, the original employer, did not disappear; that state law provides for no assumption of obligations by a purchaser of assets; and that there were significant differences in the operations of Kroger and Hamady. Joint Appendix at 210-11. The transaction between Kroger and Hamady was an arms length transaction. Finally, the District Court added that policy considerations favored Hamady in this case. The Kroger warehouse was failing and Hamady knew substantial changes would have to be made for it to be made profitable. The Court found that if Hamady had known it would have to adopt the contract, it would not have purchased the warehouse at all. District Court Opinion at 16-17, Joint Appendix at 212-13.

We affirm the District Court's decision finding that Hamady was not bound by the collective bargaining agreement between Kroger and the Union and granting Hamady's motion to dismiss.

III. KROGER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Petitioner Kroger raises three claims on interlocutory appeal. First, it claims that the District Court erred in failing to strike the plaintiffs' jury demand, thus allowing the jury to substitute its interpretation of the collective

bargaining agreement for that of the arbitrator. Second, Kroger asserts that the arbitration award cannot be set aside unless there is a finding that the Union breached its duty of fair representation and that this breach tainted the arbitrator's decision. Third, Kroger claims that the Court erred because it failed to instruct the jury on the interpretation of the term "successor" under federal labor law. This Court finds that there was no evidence that any breach of the Union of its duty of fair representation tainted the arbitrator's decision. Thus, we do not reach Kroger's first and third claims. We reverse the District Court's denial of Kroger's motion for judgment as a matter of law and remand with direction to confirm the arbitration award.

A court may not review the merits of an arbitration decision, even when the basis for the decision is ambiguous, as long as the award draws its essence from the bargaining agreement. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598-99 (1960). Even in the event of a union's breach of its duty of fair representation, an arbitration award is not quickly set aside. Kroger correctly asserts that to vacate an arbitration award on this ground, there must be two findings. First, the Union must have breached its duty of fair representation to the employee. Second, the breach of duty by the Union must have tainted the arbitrator's decision. The breach must have contributed to the arbitrator's making an erroneous decision. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

In *Hines*, the Supreme Court held that if the union's breach of its duty of fair representation seriously undermines the integrity of the arbitration process, that breach

also removes the bar of finality of the arbitration decision. *Hines,* 424 U.S. at 567. The question for the Court is whether there is substantial reason to believe that a union's breach of duty contributed to the erroneous outcome of the arbitration proceeding. The Supreme Court concluded: "Petitioners, if they prove an erroneous discharge and the Union's breach of duty tainting the decision . . . , are entitled to an appropriate remedy against the employer." *Id.* at 572.

There was conflicting evidence presented to the jury in this case with respect to the breach by the Union of its duty of fair representation in the manner of its presentation of the grievance at the arbitration hearing. However, there was no evidence from which the jury could find that there was "substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings," assuming that the outcome was erroneous. *Hines,* 424 U.S. at 568. Here, plaintiffs' position was fully presented to the arbitrator by their own attorneys. These attorneys were premitted to examine witnesses, offer evidence and participate fully in the four-day hearing before the arbitrator.

Plaintiffs cite the Union's objections to evidence and testimony presented by plaintiffs, and claim that this conduct on the part of the Union undermined the entire arbitration process. The number of objections made by a party, however, is irrelevant to the arbitrator in making his decision. Plaintiffs had ample opportunity to correct any erroneous assertions made by the Union to compensate for its behavior. Plaintiffs' independent attorneys insured that plaintiffs' interests were fairly represented. Any breach by the Union of its duty of fair representation

therefore could not have tainted the decision of the arbitrator.

Plaintiffs assert that the Union signalled to the arbitrator that it did not desire to win the case. They claim the Union accomplished this by objecting to plaintiffs' evidence and by permitting the arbitrator to see a letter from the Union attorney to the Union opining that the Union had only a fifty-fifty chance of winning the grievance. Plaintiffs had attempted to present to the arbitrator their claim that the Union had breached its duty of fair representaion in not taking stronger steps to get seniority in the contract with Hamady. In defense of that claim, the Union intended to show that it had relied on counsel's opinion that it was unlikely that Hamady was bound by the successor and assigns clause when bargaining with Hamady. The arbitrator declined to hear the unfair representation claims. An exhibit including the letter was left with the arbitrator and returned by him. The circumstances permit an inference that he may have seen the letter. Plaintiffs presented an expert witness, experienced in arbitration, who testified that signals by the Union that it didn't want to win would be likely to influence an arbitrator, although he also acknowledged that they might not and the arbitrator might indeed lean the opposite way. The essence of plaintiffs' claim is that the arbitrator did not decide the case on the basis of the evidence and law presented to him but on the basis of some signal from the Union. Plaintiffs are making an attack on the impartiality of the arbitrator. Whether the arbitrator was influenced by the Union's signals is a question relating to bias or prejudice on the part of the arbitrator. There was no claim made at trial, however, that the arbitrator was biased or influenced by the Union. Expert testimony that some arbitrators may be

influenced by union signaling does not permit the speculation that this arbitrator was so influenced where plaintiffs' own attorneys fully presented their case. There was no assertion that the arbitrator was anything but respectable, and his 82-page opinion appears to be thorough and supported by the evidence.

The evidence proffered by plaintiffs to prove that the arbitration award should be set aside does not support the requisite claim that the Union's breach tainted the arbitrator's decision, but instead goes to an issue not raised, specifically the neutrality of the arbitrator. We reverse the District Court's denial of Kroger's motion for judgment as a matter of law on the ground that there was insufficient evidence to justify vacating the arbitration award. The arbitrator's decision that Kroger did not violate the contract by failing to require Hamady to assume the contract is binding on the parties.

IV. THE UNION'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The Union argues that its conduct was not the but-for cause of any loss suffered by plaintiffs and that it therefore cannot be found liable to plaintiffs for breach of the duty of fair representation. The District Court, denying the Union's motion for judgment notwithstanding the verdict, found that there was sufficient evidence to support the findings of the jury that the Union violated its duty both apart from and during the arbitration. We hold that the Union is not liable to plaintiffs for any form of damages, including attorneys' fees, and we reverse the District Court's denial of the Union's motion for judgment as a matter of law.

Plaintiffs claim that the Union breached its duty of fair representation with respect to its representation of their claims against Hamady and Kroger both apart from and during the arbitration. Where the alleged breach relates to the arbitration, an employee will not be entitled to recover from a union if the union's breach did not lead to injury. A court will not award sanctions that are solely punitive against a union. In *Hines v. Anchor Motor Freight, Inc.*, the Supreme Court stated: "To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines*, 424 U.S. at 570-71. *See also United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62 (1981); *Clayton v. United Automobile Workers*, 451 U.S. 679, 683 n.4 (1981). This Court has similarly held that a union owed no damages to a plaintiff if the employer did not act wrongfully. *St. Clair v. Local Union No. 515, Int'l Brotherhood of Teamsters*, 422 F.2d 128, 132 (6th Cir. 1969). In the case before this Court, therefore, plaintiffs must prove both the breach of duty and the wrong of the employer that resulted in their loss. We have dismissed plaintiffs' claims with respect to both Hamady and Kroger. Because, as found by the arbitrator, there was no breach of the collective bargaining agreement and no injury to plaintiffs, we find no liability on the part of the Union with respect to its representation of their claims during the arbitration proceeding.

With respect to conduct apart from the arbitration, the Union is liable for damages only if its breach was a "but-for" cause of those damages. "[C]ourts have held unions not liable for breaches of their duty of fair representation absent evidence that but for the union's conduct the em-

ployee would not have been injured." *Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574, 580 n.8 (8th Cir. 1981). The Court of Appeals for the Third Circuit also summarized the applicable law relating to a union's breach of duty in this situation: "[T]he federal courts have consistently required a direct nexus between breach of this duty and resultant damages to the individual or minority segment as an element of liability." *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977).

In support of their claim of breach of the duty of fair representation, plaintiffs submit numerous acts of the Union conduct apart from the arbitration and other actions it failed to take. They claim, among other things, that the Union failed to keep its members advised as to the negotiations with Hamady, failed to make reasonable efforts to require Hamady to honor the contract, negotiated a new deal with Hamady considering solely its own interests, and harassed plaintiffs, Supplemental Complaint, Joint Appendix at 80-84. In order to recover against the Union, plaintiffs must demonstrate that Hamady would have adopted the contract and that they would not have been injured had the Union not breached its duty. *See Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir. 1986) (affirming grant of summary judgment against employees because plaintiffs could not establish that the employer would have given in to their demands).

We can only speculate whether Hamady would have hired the employees by seniority in accordance with the contract if the Union had performed all the acts and refrained from all the acts which plaintiffs claim it should have. Plaintiffs presented no evidence to establish this causal connection between the Union's alleged breach and

their alleged injuries. We hold that the Union is not liable to plaintiffs with respect to its representation of their interests apart from the arbitration.

Plaintiffs finally claim that they are entitled to the expenses they incurred because the Union would not fairly represent them in the arbitration proceeding. These expenses consist of attorneys' fees due the counsel that represented the plaintiffs in the four-day hearing. Plaintiffs assert that because the Union failed to fairly represent their interests, plaintiffs hired their own outside counsel and thus were damaged to the extent of the attorneys' fees. Plaintiffs contend that the Union's breach caused damage that is independent of the claims against Kroger and Hamady and that they should be able to recover these expenses regardless of the outcome of their grievance.

Several courts have held that an employee may recover attorneys' fees even where the outcome of the arbitration favored the employer. In *Del Casal v. Eastern Airlines, Inc.*, the union's refusal to process the claims of an employee was found to be a breach of its duty. *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981). Although the claim of wrongful discharge was decided in favor of the employer, the court awarded attorneys' fees to the plaintiff. The court stated that "[h]ere, the damage caused by the union was the attorney's fee which Del Casal incurred as a result of the union's breach." *Id.* at 301. Citing *Del Casal*, the Court of Appeals for the First Circuit held that a union was liable only for the increase in damages to the plaintiff that it brought about. It stated, however, that "[t]hese additional damages—apparently consisting of additional legal costs—were incurred . . . whether or not [the plain-

tiff] won on the merits of his grievance." *Stanton v. Delta Airlines, Inc.*, 669 F.2d 833, 838 (1st Cir. 1982). Similarly, the Court of Appeals for the Ninth Circuit has held that an employee is entitled to attorneys' fees incurred because he is forced to represent himself. *See Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983).

Claims for attorneys' fees in cases such as this one must be examined on a case-by-case basis. We decline to follow the circuits that have granted recovery of damages in the form of attorneys' fees where the plaintiff did not prevail on the merits of the grievance. The Union is intended to serve as the exclusive agent for the member employees and employees should be discouraged from pursuing their claims independently. Moreover, it is against "sound judicial policy to encourage actions to recover only the costs of litigation where no underlying right can any longer be vindicated in the action." *Badon v. General Motors Corp.*, 679 F.2d 93, 98 (6th Cir. 1982). Granting attorneys' fees to each member employee who demonstrates a breach of the duty of fair representation but no injury will lead to frivolous actions. We hold that plaintiffs are not entitled to recover attorneys' fees from the Union.

V. CONCLUSION

We affirm the District Court's judgment granting Hamady's motion to dismiss. We reverse the Court's denial of petitioners-appellants' motions for judgment notwithstanding the verdict and we remand with direction to confirm the arbitration award.[3]

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[3]We do not reach the issue discussed by Judge Contie in his separate concurrence. However, we have no disagreement with his analysis.

CONTIE, Senior Circuit Judge. I concur in the majority's conclusion, reversing and remanding this case and agree with its analysis in reaching that conclusion. However, I would have resolved the important issue of whether the right to a jury trial exists in a hybrid action for breach of a collective bargaining agreement and breach of the duty of fair representation brought under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). In the present case, both the Union and Kroger moved to strike the plaintiffs' demand for a jury trial. The district court denied the motions and the plaintiffs' hybrid § 301 action was tried to a jury.

Generally, the right to a jury trial exists either under the Seventh Amendment or by statute. Clearly, no labor statute specifically grants the right to a jury trial in a hybrid § 301 action. Thus, the sole question is whether the right exists under the Seventh Amendment. That amendment states that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." The Seventh Amendment guarantees jury trials not only in actions known at common law, but also in actions created after passage of the Seventh Amendment "if the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (footnote omitted). Thus, whether a jury trial is available depends on the historical nature of the claim; a claim "legal" in nature is generally triable to a jury where an "equitable" claim is not.

In determining whether the right to a jury trial exists for a newly-created action, the focus is "on the nature of

the *issue* to be tried rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (emphasis added, footnote omitted). Thus, resolution of the jury trial question turns on whether the issues involved are legal or equitable in nature. As the Supreme Court observed in *Ross*, "the legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions [i.e., whether that type of issue was customarily tried to a jury or court]; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.* at 538 n.10. This Circuit has recognized that the second of these elements is the most significant. *Hildebrand v. Board of Trustees*, 607 F.2d 705, 708 (6th Cir. 1979), *cert. denied*, 456 U.S. 910 (1982).

The individual issues presented in this case, as in any hybrid § 301 action, are whether the Union breached its duty of fair representation and whether the employer, Kroger, breached the collectively bargained labor contract. I would find that the fair representation issue is equitable in nature, and therefore not triable to a jury, because the primary relief sought for breach of the duty of fair representation is equitable. That is, in order to reach the breach of contract issue, the plaintiffs had to have the arbitration award set aside, which could only be done by proving that the Union breached its duty of fair representation and also seriously undermined the arbitration process. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). Setting aside an arbitration award is certainly an equitable remedy. Therefore, under *Ross*, the duty of fair representation claim would be considered equitable in nature.

However, considering the breach of contract issue separately from the fair representation issue, I would find that it is legal in nature and triable to a jury. A breach of contract claim customarily presents a legal issue and the remedy sought for this particular claim, damages in the form of back-pay, is a legal remedy. Thus, I believe that under *Ross* the claim against Kroger was triable to a jury as "legal" claim.[1]

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[1]In my opinion, these conclusions are not inconsistent with the Supreme Court's pronouncements in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Both cases involved § 301 hybrid actions, both involved statute of limitations questions, and in both the Court elaborated on the nature of hybrid § 301 actions. In *Mitchell*, the Court rejected the notion that a hybrid § 301 action could be characterized as a tort or contract action, stating that the action was "more analogous to an action to vacate an arbitration award than to a straight contract action." 451 U.S. at 62. In *DelCostello*, the Court maintained its view that a hybrid § 301 action is not analogous to a contract claim, but retreated from the "imperfect" view that it was analogous to an action to vacate an arbitration award. The Court instead analogized hybrid § 301 actions to unfair labor practice actions and therefore held applicable to hybrid § 301 actions the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act.

Neither *Mitchell* nor *DelCostello* apply in the present situation because both involved statute of limitation questions and therefore focused on the *overall* characterization of a hybrid § 301 action, rather than on the nature of the individual issues presented in such an action. Under *Ross*, the latter inquiry, and not the former, is clearly the proper focus in determining a Seventh Amendment question. *See Ross*, 396 U.S. at 538.

Accordingly, I would have held that the district court erred in denying in their entirety the motions to strike the plaintiffs' jury demand. In my opinion, the court instead should have granted the motions with regard to the fair representation claim and tried the issues inherent in that claim itself. Then, only if the court concluded that the arbitration award had to be set aside, which we hold today that it could not have been, should it have tried the breach of contract claim to a jury.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 85-1880
85-1963
85-1964

KENNETH WOOD, JEFFREY FANSLER, CHARLES BOHNER, et al.,

Plaintiffs-Appellants, (85-1880)
Respondents-Appellees,
85-1963/1964),

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, et al.,
HAMADAY BROTHERS, FOOD MARKETS, INC.,

Defendants-Appellees, (85-1880)

KROGER COMPANY,

Petitioner-Appellant, (85-1963)

GENERAL TEAMSTERS UNION LOCAL 406,

Petitioner-Appellant, (85-1964).

Before: KEITH and KENNEDY, Circuit Judges; and CONTIE, Senior Circuit Judge.

J U D G M E N T

ON APPEAL from the United States District Court of the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court granting Hamady's motion to dis-

miss is affirmed; the said District Court's denial of Petitioners' motions for judgment notwithstanding the verdict is reversed; and the case is remanded with direction to confirm the arbitration award.

Each party is to bear its own costs on appeal.

MANDATE: February 9, 1987

COSTS: NONE

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ John P. Hehman
Clerk

A TRUE COPY

Attest:

JOHN P. HEHMAN, Clerk

By /s/ (Illegible)
Deputy Clerk

No. 85-1880/1963/1964

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH WOOD, ET AL.,	)	
Plaintiffs-Appellants	)	
v.	)	ORDER
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 406, ET AL.,	)	(Filed January 30, 1987)
Defendants-Appellees	)	

BEFORE: KEITH and KENNEDY, Circuit Judges and CONTIE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and not judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

86 1759

Supreme Court, U.S.
FILED
JUN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1759

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

KENNETH WOOD, et al.,
Petitioners

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, KROGER COMPANY AND HAMADY BROTHERS FOOD MARKETS, INC.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT KROGER COMPANY BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners framed six questions for review by this Court in their Petition For Writ of Certiorari (Petition For Certiorari, pp. i-ii). Questions three and four pertain to Petitioners' action against the Respondent Union and question six pertains to their action against Respondent Hamady Brothers Food Markets, Inc. Respondent Kroger Company does not address those questions.

Questions one, two and five in the Petition For Writ of Certiorari bear on Petitioners' action against Respondent Kroger Company and are addressed herein. As framed by Petitioners, however, these questions are inappropriately stated because they ignore the fact that the Sixth Circuit Court of Appeals decision was not issued in a vacuum but is predicated on the record made in this case. Accordingly, Respondent Kroger Company restates the questions presented vis-a-vis Petitioners' action against it as follows:

1. In a hybrid § 301 action, can a district court entertain an action against an employer for claimed breach of a collective bargaining agreement when a labor arbitration award has been issued in favor of the employer and there is no finding that the award is erroneous and no evidence that the union's breach of duty of fair representation tainted the arbitrator's decision?

2. When there is no evidence that a labor arbitration award was tainted by the union's breach of duty of fair representation and the plaintiffs-employees were fully represented by their own attorneys in the arbitration hearing, can a court conclude that the union's breach of duty of fair representation did not taint the arbitrator's decision?

3. In a hybrid § 301 action when a labor arbitration award stands between the plaintiffs-employees and a judicial remedy against the employer, are the plaintiffs-employees entitled to a jury trial on their action against the employer when there is no finding that the arbitration award is erroneous and absent any evidence that the arbitrator's award was tainted by the union's breach of duty of fair representation?

*Respondent Kroger Company's parents, subsidiaries and affiliates (except wholly owned subsidiaries) are: HSI, Inc., a Delaware Corporation (owner of 30% of its stock); Foodland Distributors, a partnership between it and Witterau, Inc., a St. Louis, Mo. Wholesale Company (50% partner); and Irvine Ranch Farmers Market, Inc., a California Corporation (30% of its stock).

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IN THE
SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM 1986
NO. 86-1759

KENNETH WOOD, ET AL.,
Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, KROGER COMPANY AND HAMADY BROTHERS FOOD MARKETS, INC.

Respondents.

RESPONDENT KROGER COMPANY BRIEF IN OPPOSITION

Respondent Kroger Company respectfully submits that this Court should deny the Petition For Writ of Certiorari seeking review of the Sixth Circuit Court of Appeals decision in this case because there are no special or important reasons for granting certiorari according to the considerations governing review on certiorari as set forth in Rule 17 of the Rules of this Court.

STATEMENT OF THE CASE

This case presents a hybrid action grounded on § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Petitioners brought an action claiming, *inter alia*, entitlement to damages against Respondent Kroger Company, their former employer, for alleged breach of a collective bargaining agreement and against the Respondent Union for alleged breach of the duty of fair representation. The facts material to consideration of the Petition

For Certiorari are set forth in the opinion of the Sixth Circuit Court of Appeals[1] and are set forth below.[2]

This case arose out of Respondent Kroger Company's ("Kroger") lease/sale of a grocery warehouse to Hamady Brothers Food Markets, Inc ("Hamady"). Appendix, p. 2a. The transaction between Kroger and Hamady was an arms length transaction. Appendix, p. 12a. Petitioners were employed by Kroger at the time of the sale of the warehouse to Hamady and were covered under a collective bargaining agreement between Kroger and Respondent, Teamsters Local 406 (the "Union"). Appendix, pp. 2a-3a. The collective bargaining agreement provided that "[T]his Agreement shall be binding not only upon the parties but upon their successors and assigns." Appendix, p. 3a. It also established a grievance procedure, which was the exclusive mechanism for resolving disputes over the interpretation or application of the contract. The final and binding step of the grievance procedure was arbitration. Appendix, p. 3a.

The Kroger warehouse was a failing business,[3] and Hamady refused to assume the Kroger collective bargaining agreement when it purchased the warehouse assets. Appendix, p. 4a. Hamady did, however, hire approximately half of the former Kroger employees, but did not hire in order of seniority. Appendix, p. 4a. Hamady also recognized the Union as the exclusive bargaining agent for its new employees and entered into a collective bargaining agreement with the Union covering the warehouse. Appendix, p. 4a-5a.

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[1] *Wood, et al. v. International Brotherhood of Teamsters, etc., Local 406, et al.*, Appendix, pp. 1a-22a; 807 F.2d 493 (6th Cir. 1986).

[2] Petitioners' Statement of Facts is not accompanied by any citations to the record or opinions below and is a self-serving argumentative narrative. Petitioners so-called Statement of Facts is premised on the paralogism that because the jury rendered a verdict in their favor, it may be assumed that the jury found all the facts to be as argued by Petitioners.

[3] Due to unfavorable economic conditions, Hamady ceased operations within one year after it acquired the warehouse. Appendix, p. 4a, n.2.

Petitioners filed an action claiming that: (1) the Union breached its duty of fair representation, (2) Kroger had breached the collective bargaining agreement by failing to bind Hamady to the agreement and (3) Hamady was liable to assume the collective bargaining agreement as a "successor" to Kroger. Appendix, p. 5a. The district court on motion of the Union ordered Kroger and Hamady to arbitrate the issues. It also ordered that Petitioners be allowed to have their own spokesperson participate in the arbitration proceedings. Appendix, p. 5a.

The arbitration hearing lasted four days. Petitioners were represented by the Union and by their own attorneys, who participated fully in the hearing. Petitioners' attorneys presented witnesses, cross-examined witnesses of the other parties and submitted briefs. Appendix, p. 6a. The arbitrator issued an opinion and award interpreting the "successors and assigns" provision in the collective bargaining agreement. The arbitrator found that Hamady was not a "successor" to Kroger and that the collective bargaining agreement did not obligate Kroger to require Hamady to assume the Kroger labor agreement as a condition of the asset sale to Hamady.[4] Appendix, p. 6a. The arbitration decision and award was final and binding in accordance with the express terms of the collective bargaining agreement. Appendix, p. 6a.

After the arbitration award issued, Petitioners moved for a jury trial in the district court. The district court denied Kroger's motions to strike the jury trial demand and for summary judgment. Appendix, p. 6a. The case proceeded to trial before a jury on the issues of liability of Kroger, the Union and Hamady. At the conclusion of Petitioners' proofs, the district court granted Hamady's motion to dismiss on the ground that Hamady was not a "successor" to Kroger and was not obligated to assume Kroger's collective bargaining agreement. Appendix, p. 6a-7a.

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[4]The arbitrator's opinion and award is published in 78 Lab. Arb. (BNA) 589 (1982) (Howlett, Arb.).

At the conclusion of the trial, the district court instructed the jury that if they found that the Union breached its duty of fair representation undermining the arbitral process, then the jury, notwithstanding the arbitrator's decision and award, could proceed to interpret the collective bargaining agreement and determine whether Kroger had breached the agreement. Appendix, pp. 7a-8a. The jury found that the Union had breached its duty of fair representation in the arbitration process. Absent any finding that the arbitrator's decision was erroneous, the district court then permitted the jury to substitute its interpretation of the collective bargaining agreement for that of the arbitrator. The jury held that Kroger was obligated to require Hamady to assume the agreement when Kroger sold the warehouse to Hamady. Appendix, p. 8a.

The district court denied motions of Kroger and the Union for judgment notwithstanding the verdict. Appendix, p. 8a. Thereafter on the petitions of Kroger and the Union, the district court certified an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and the Sixth Circuit granted permission to appeal. Appendix, pp. 8a-9a. Kroger raised three claims on appeal. First, Kroger contended that the district court erred in failing to strike Petitioners' jury demand, thus allowing the jury to substitute its interpretation of the collective bargaining agreement for that of the arbitrator. Second, Kroger asserted that the arbitration award could not be set aside unless there is a finding that the Union's breach of duty of fair representation tainted the arbitrator's decision. Third, Kroger claimed that the district court erred in failing to instruct the jury on the interpretation of the term "successor" under federal labor law. Appendix, pp. 12a-13a. The Sixth Circuit did not reach Kroger's first and third claims. Appendix, p. 13a.

Applying this Court's holding in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 524 (1976), the Sixth Circuit held that the arbitrator's award could not be set aside unless there was a finding that the Union breached its duty of fair representation in the arbitral process and a finding that the breach of duty by the Union tainted the arbitrator's decision. Appendix, p. 13a. The court

found that there was "no evidence" that the Union's breach of duty of fair representation tainted the outcome of the arbitration proceeding. Appendix, p. 14a. Accordingly, the Sixth Circuit reversed the district court's denial of Kroger's motion for judgment n.o.v. and remanded the case with direction to confirm the arbitrator's award. Appendix, pp. 13a, 15a-16a, 19a.

Petitioners seek to portray this case as one of precedential significance. It is clearly not such a case. The Sixth Circuit simply applied legal principles established by this Court in disposing of a case which was erroneously decided in the district court as a matter of law.

SUMMARY OF ARGUMENT

This is a so-called hybrid § 301 action wherein Petitioners brought an action against the Union for breach of the duty of fair representation and against Kroger for alleged breach of a collective bargaining agreement. Prior to trial before the district court, Petitioners' claim against Kroger was submitted to final and binding arbitration. The arbitrator ruled that Kroger did not breach the collective bargaining agreement. On the record made in this case, there is no finding that the arbitrator's decision was erroneous and the Sixth Circuit Court of Appeals found that there is no evidence that the Union's breach of duty of fair representation in the arbitration process tainted the arbitrator's decision.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) this Court held that when, as here, a labor arbitration award stands between the plaintiffs-employees and a judicial remedy against an employer for alleged breach of a collective bargaining agreement, the plaintiffs-employees must prove that the arbitrator's award was erroneous and that the union's breach of duty of fair representation tainted the arbitrator's decision to be entitled to a remedy against either the employer or the union. *Hines, supra*, 424 U.S. at 572. The Sixth Circuit Court of Appeals correctly held that pursuant to the holding in *Hines, supra*, and on

the record in this case Petitioners were not entitled to a judicial remedy against either Kroger or the Union.

Whether Petitioners were entitled to a jury trial of their actions against Kroger and the Union in this case is academic. Petitioners were not entitled to reach the merits of their action against Kroger unless the district court could set aside the arbitration award. There was no basis on which the arbitration award could be set aside and, accordingly, Petitioners were not entitled to a jury trial and could not prevail on the merits of their claims against either Kroger or the Union. *Hines, supra,* 424 U.S. at 570-571.

ARGUMENT
REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

THE HOLDING OF THE SIXTH CIRCUIT COURT OF APPEALS COMPORTS WITH THE DECISION OF THIS COURT IN *HINES V. ANCHOR MOTOR FREIGHT, INC.*, AND IS NOT IN CONFLICT WITH THE DECISION OF ANY COURT OF APPEALS

In this action, Petitioners sought a judicial remedy against the Union for alleged breach of the duty of fair representation and against Kroger for alleged breach of the collective bargaining agreement. Petitioners' claim against Kroger turned on the interpretation and application of the terms of the collective bargaining agreement between Kroger and the Union. Prior to the trial before the district court, Petitioners' claim against Kroger was resolved in an arbitration proceeding ordered by the court. The arbitrator interpreted the collective bargaining agreement and ruled that Kroger did not breach the agreement by not requiring Hamady to assume the agreement when Hamady purchased the warehouse assets.

Petitioners' claims against the Union and Kroger, while interrelated, are conceptually separate and distinct. The claim

against Kroger is in effect an action to set aside the arbitrator's award. *United Parcel Service v. Mitchell*, 451 U.S. 56, 62, 72 (1981) (Stevens, J., concurring in part and dissenting in part); *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 157 (1983).

Petitioners fail to comprehend the critical fact that in the context of this case "an arbitrator's award stands between the employee [Petitioners] and any relief which may be awarded against the Company [Kroger]." *Mitchell, supra*, 451 U.S. at 62, n. 4. The arbitrator's decision turned on the interpretation of the collective bargaining agreement. The question of interpretation of the collective bargaining agreement is a question for the arbitrator and "the courts have no business overruling him because their interpretation of the contract is different from his." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Accordingly, unless the Union's breach of duty of fair representation tainted the arbitrator's decision, neither a court nor a jury can overrule the arbitrator's award and entertain a remedy against Kroger. *Hines, supra*, 424 U.S. at 572; *Steelworkers, supra*, 363 U.S. at 596, 598-599.

The collective bargaining agreement here involved provided that the arbitration award is final and binding. Appendix, p. 3a. Ordinarily such a binding arbitration clause guarantees the finality of a labor arbitration award unless the award does not draw its essence from the collective bargaining agreement. *Steelworkers, supra*, 363 U.S. at 596-599; *W.R. Grace & Co. v. Local 759, Rubber Workers, etc.*, 461 U.S. 757 (1983). In *Hines v. Anchor Motor Freight, Inc., supra*, however, this Court carved out a limited exception to the rule of arbitral finality permitting judicial review of a labor arbitration award when the union's breach of duty of fair representation undermines the integrity of the arbitration process.

The *Hines v. Anchor Motor Freight, Inc.*[5] Exception To The Rule of Arbitral Finality

In *Hines*, *supra*, certiorari was granted on the question of whether a joint grievance committee's decision upholding the petitioners' discharge for alleged dishonesty barred their suit against their former employer for wrongful discharge when the union breached its duty of fair representation in processing the grievances so as to deprive the petitioners and the grievance committee of overwhelming evidence of the petitioners' innocence. *Hines*, *supra*, 424 U.S. at 561, n. 7. This Court held that when the union's breach of duty seriously undermines the integrity of the arbitral process, the usual bar of finality of the arbitration award is removed. *Hines*, *supra*, 424 U.S. at 567. Once the bar of finality is removed, the arbitration decision is then reviewable and the focus is "on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the *erroneous outcome* of the contractual proceedings." *Hines*, *supra*, 424 U.S. at 568. Emphasis added.

The focal point of the Court's concern and its holding in *Hines*, *supra*, was the extent to which *erroneous* arbitration decisions should be insulated by the rule of arbitral finality. *Hines* "rejected the suggestion that 'erroneous arbitration decisions must stand in the face of a union's breach of its duty.' " *Mitchell*, *supra*, 451 U.S. at 61. The Court stated that the grievance process cannot be expected to be error free, but it is quite another matter to suggest that "erroneous arbitration decisions" must stand even though the union's representation has been dishonest, in bad faith or discriminatory. *Hines*, *supra*, 424 U.S. at 571. Thus, the Court held that:

> Petitioners, if they prove an *erroneous* discharge [i.e., the joint grievance committee erred in its decision] *and* the Union's breach of duty *tainting the decision* of the joint

[5]424 U.S. 554 (1976).

> committee, are entitled to an appropriate remedy against the employer . . . *Hines, supra*, 424 U.S. at 572 (Emphasis added).

Applying the holding of *Hines, supra*, to the instant case, in order to be entitled to a remedy against Kroger and avoid the finality otherwise attaching to the arbitrator's decision, Petitioners were required to prove that the arbitrator's interpretation of the collective bargaining agreement was erroneous and that the Union's breach of the duty of fair representation tainted the decision of the arbitrator. Petitioners do not even contend that the arbitrator's interpretation of the collective bargaining agreement is erroneous, and the Sixth Circuit found that there is "no evidence" to support a finding that the Union's breach of duty tainted the arbitrator's decision. Appendix, p. 14a.

Petitioners' argument is bottomed on a misreading of *Hines, supra*. They erroneously contend that a mere showing that a union breached its duty of fair representation in the arbitral process is sufficient to set aside a labor arbitration award without regard to whether the arbitrator's decision is erroneous and without regard to whether the Union's breach of duty of fair representation tainted the arbitrator's decision.

If a union breaches its duty of fair representation in the arbitral process, it does not follow that the employer breached the collective bargaining agreement and that the arbitrator's decision is erroneous. *Mitchell, supra*, 451 U.S. at 73, n. 4 (Stevens, J., concurring in part and dissenting in part); *McNaughton v. Dillingham Corp.*, 707 F. 2d 1042, 1048 (9th Cir. 1983). There is no holding or suggestion in *Hines, supra*, that a mere showing that the union breached its duty of fair representation in the arbitral process voids the arbitrator's award per se and permits the court to entertain a suit against the employer. The Sixth Circuit correctly interpreted and applied this Court's holding in *Hines, supra*, in the instant case.

The Sixth Circuit's Decision Is Not In Conflict With The Decision Of Any Other Circuit Court Of Appeals

Petitioners argue that the Sixth Circuit's decision is at odds with "decisions" of the First, Second, Fifth, Seventh, Eighth and Tenth Circuit Courts of Appeals. Their argument is constructed by excising statements from six cases and misapplying them out of context. Even a cursory review of the actual "decisions" in the cases cited by Petitioners demonstrates that their argument is fallacious.

Petitioners' contention that the decision in *Santos v. District Council of New York City, etc.*, 547 F. 2d 197 (2nd Cir. 1977) is in conflict with the Sixth Circuit decision in this case is utterly fatuous. One need read no further than the first sentence in the Court's opinion to discern that *Santos* is inapposite to the instant case. As stated by the Court, *Santos* was "a case of first impression" presenting "the issue whether members of one union may sue another union for failure to comply with an arbitral decree made pursuant to a labor federation's constitutional provision pertaining to interunion jurisdictional disputes." *Santos, supra*, 547 F. 2d at 198.

Petitioners erroneously assert that *Santos* supports their claim that a labor arbitration award, without regard to whether it is erroneous, can be set aside solely on the basis of a finding that the union breached its duty of fair representation in the arbitration process. No such claim was even presented or ruled on in *Santos*. The court expressly noted that the appellants did not seek and had no reason to seek to set aside the arbitration award. *Santos*, 547 F. 2d at 201.

By analogy to *Hines v. Anchor Motor Freight, Inc.*, the *Santos* court held only that appellants' allegations of the union's breach of duty of fair representation were sufficiently serious to withstand a motion for summary judgment and enable the court to entertain an action against the union. *Santos, supra*, 547 F. 2d at 202. In *Santos*, there was no remedy sought against any

employer, no claimed breach of a collective bargaining agreement and no attempt to set aside an arbitration award. There is patently no conflict between the decision in *Santos* and the Sixth Circuit's decision in this case.

The claim of Petitioners that the decision of the Sixth Circuit is opposed to the decision in *Barnett v. United Air Lines, Inc.*, 738 F. 2d 358 (10th Cir. 1984), *cert denied*, 469 U.S. 1087 (1984) exhibits a careless inattention to the actual holding in *Barnett*. In *Barnett*, an arbitration board established under the Railway Labor Act denied appellant's grievance protesting an adjustment in his seniority status. The appellant brought an action against the union and the employer seeking to vacate the arbitration award. The district court granted summary judgment in favor of the union and the employer on the grounds that the action was barred by the Colorado statute of limitations.

The only issues presented on appeal in *Barnett*, as stated in the court's opinion, were "(1) whether the district court erred in applying the ninety day Colorado statute of limitations and (2) whether Barnett timely filed this action under the applicable statute." *Barnett, supra*, 738 F. 2d at 361. The court held that § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), was the appropriate statute of limitations and that appellant's action was time barred. The dismissal of appellant's action was affirmed. *Barnett, supra*, 738 F. 2d at 361.

The court in *Barnett* stated that it was not necessary to reach the merits of appellant's claims against the union and the employer. *Barnett, supra*, 738 F. 2d at 362, n. 2. By way of dictum, however, the court noted that pursuant to this Court's holding in *Hines, supra*, appellant was "potentially able" to challenge the arbitration decision if he could show a union breach of duty of fair representation which seriously undermined the arbitral process. *Barnett, supra*, 738 F. 2d at 362. The court did not hold or opine that a showing of a breach of the duty of fair representation by the union would suffice to set aside the arbitration award absent a finding that the union's breach of duty tainted the arbitrator's

decision. The *Barnett* court simply observed that a showing of a breach of duty of fair representation is a jurisdictional prerequisite to entertaining an action to set aside an arbitration award. *Barnett, supra*, 738 F. 2d 362, n. 2.

The decision of the Sixth Circuit is entirely consistent with the dictum statement of the court in *Barnett*. The Sixth Circuit held that before a court can review the merits of an arbitration decision and set aside an arbitration award there must be a showing that the union breached its duty of fair representation in the arbitral process. Appendix, pp. 13a-14a. Unlike *Barnett*, however, the Sixth Circuit did reach the merits of the action to set aside the arbitrator's award and held that it could not be set aside because there was no evidence that the Union's breach of duty tainted the arbitrator's decision.

Petitioners' claim that the Sixth Circuit's decision is antithetical to the decision of the First Circuit Court of Appeals in *Sear v. Cadillac Automobile Company of Boston*, 654 F. 2d 4 (1st Cir. 1981) is apocryphal. In *Sear*, the appellants were assessed fines in an arbitration proceeding because of their engaging in an illegal strike. They brought an action against the union and the employer claiming the union breached its duty of fair representation by failing to appeal the arbitration award. The district court disposed of the case by summary judgment, holding that the union did not breach its duty of fair representation and that without such a breach by the union the employees could not mount a collateral attack on the arbitration award.

The only question considered on appeal in *Sear* was whether the union's failure to appeal from the arbitration award breached its duty of fair representation. The court held that it did not and affirmed the dismissal of the action. *Sear, supra*, 654 F. 2d at 5. It stated that under *Hines, supra*, there must be a threshold showing of a breach of duty of fair representation by the union in the arbitral process in order to avoid the finality rule attaching to a labor arbitration award. *Sear, supra*, 654 F. 2d at 7. Since the appellants failed to meet this threshold burden, the *Sear* court did

not reach the question of whether the arbitration award could be set aside. The court, however, plainly intimated that the arbitration award could not be set aside in any event because "[T]he award itself was not *obviously* invalid" since it "drew [its] essence from the contract." *Sear, supra*, 654 F. 2d at 7.

The First Circuit's interpretation of the holding in *Hines, supra*, is in complete accord with the decision of the Sixth Circuit. Both courts agree that in order to vacate a labor arbitration award the complaining employee must show both that the union breached its duty of fair representation in the arbitral process and that such breach of duty tainted the arbitrator's decision.

In *Early v. Eastern Transfer, Inc.*, 699 F. 2d 552 (1st Cir. 1983), as in *Sear, supra*, 654 F. 2d 4, the court did not even reach the issue of whether the arbitration award could be set aside. Thus, contrary to Petitioners' argument, there is clearly no conflict between the decision in that case and the Sixth Circuit's decision in the instant case. In *Early*, the appellants brought an action against their union and their former employer seeking to set aside an arbitration award upholding their discharge. The district court granted summary judgment dismissing the action on the grounds that there was no triable issue of fact relative to the claim that the union breached its duty of fair representation in the arbitration process. The First Circuit affirmed the dismissal.

The court in *Early* stated that a showing of a union's breach of duty of fair representation in the arbitration process is only a "prerequisite" to judicial review of an arbitration award. *Early, supra*, 699 F. 2d at 555, n. 3. The court stated that —

> To have a right to contest the merits of their discharge in court, the Earlys must first show that the union violated its duty of fair representation; otherwise the decision of the joint committee is "final and binding". *Early, supra*, 699 F.2d at 555 (Citation omitted).

The decision of the Sixth Circuit in this case is consonant with the decision in *Early*, i.e., a showing of a breach of duty of fair representation by the Union is only a prerequisite to judicial examination of a labor arbitration award. Appendix, p. 13a. The *Early* court, however, did not address or rule on the question of whether the arbitration award could be set aside.

Petitioners' contention that the decision in *Del Casal v. Eastern Airlines, Inc.*, 634 F. 2d 295 (5th Cir. 1981), *cert. denied*, 454 U.S. 892 (1981) is oppugnant to the Sixth Circuit's holding in the instant case is plainly without merit. In *Del Casal*, the court held that the union's discriminatory refusal to provide the appellant with representation before an arbitration board, which upheld appellant's discharge, constituted a breach of the union's duty of fair representation. *Del Casal, supra*, 634 F. 2d at 301. Notwithstanding the finding that the union breached its duty of fair representation in the arbitration process, however, the court affirmed the district court's finding that the arbitration award could not be set aside because the union's breach of the duty of fair representation had no prejudicial effect on the arbitration decision. *Del Casal, supra*, 634 F. 2d 300, 301.

The decision in *Del Casal* is on all fours with the Sixth Circuit decision. Both courts held that a labor arbitration award cannot be set aside and an employee may not maintain a breach of collective bargaining agreement action against the employer when there is no showing that the union's breach of duty of fair representation tainted the arbitrator's decision.

The decision of the Seventh Circuit in *Miller v. Gateway Transportation*, 616 F. 2d 272 (7th Cir. 1980) is likewise in complete harmony with the decision of the Sixth Circuit, contrary to Petitioners' misrepresentation. In *Miller*, the appellant brought an action against his former employer and the union claiming that an arbitration panel wrongfully sustained his discharge and that the union breached its duty of fair representation. The court agreed with the employer's contention that the arbitration decision could be set aside only if the appellant could "show both that

the underlying grievance was meritorious [i.e., that the arbitration decision was erroneous] and that the union breached its duty of fair representation." *Miller, supra*, 616 F. 2d at 275-276. The court found that the record showed triable genuine factual issues going to the merits of appellant's claims. Accordingly, the court reversed the district court's grant of summary judgment and remanded the case for trial. *Miller, supra*, 616 F. 2d at 277.

In the instant case, the Sixth Circuit held that Petitioners' could maintain an action to set aside the arbitration award only if they could show both that the Union breached its duty of fair representation in the arbitral process and that the Union's breach of duty tainted the arbitrator's decision. The *Miller* decision is in complete accord with such holding.

The claim of Petitioners that the Sixth Circuit's decision is in conflict with the Seventh Circuit's reading of *Hines, supra*, is further negated by the following statement in *Huffman v. Westinghouse Electric Corporation*, 752 F. 2d 1221, 1225-1226 (7th Cir. 1985):

> [T]he Supreme Court has given further indications that employees seeking to litigate the merits of grievances that have been processed to final decision must show that the decision is tainted by the bad faith of the union that processed the grievance.

Petitioners' claim that the Eighth Circuit Court of Appeals decision in *Tatum v. Frisco Transportation Company*, 626 F. 2d 55 (8th Cir. 1980) is contrary to the decision of the Sixth Circuit demonstrates a misreading of the Eighth Circuit's actual holding. In *Tatum*, as in this case, the court held that if the union breaches its duty of fair representation in the arbitration process, the arbitrator's decision is reviewable on the merits. *Tatum, supra*, 626 F. 2d at 59. The *Tatum* court reviewed the arbitration decision on the merits and held that the union's breach of duty of fair representation clearly tainted the arbitration decision. *Tatum, supra*, 626 F. 2d at 59. The Sixth Circuit reviewed the arbitrator's

decision in the instant case and found that there is no evidence that the union's breach of duty tainted the arbitrator's decision.

In *Tatum*, an employee claimed that his former employer discharged him in breach of the collective bargaining agreement, contrary to the decision of an arbitration panel, and that the union breached its duty of fair representation in representing him before the arbitration panel. The court found that in the arbitration hearing the union did not call any witnesses, did not present any affidavits, nor did it inform the employee of the time of the hearings. Moreover, the union "also ignored many obvious sources of proof which could have shown that Tatum was discharged ... in violation of ... the collective bargaining agreement." *Tatum*, 626 F. 2d at 59. In short, the union's failure to present obvious evidence to the arbitration panel showing that the employee was in fact wrongfully discharged clearly tainted the arbitration decision and contributed to an erroneous outcome of the arbitration proceeding.

The Sixth Circuit in this case and the Eighth Circuit in *Tatum* applied the same standard for judicial review of an arbitration award. They reached different conclusions, however, because the evidence of record mandated different conclusions.

The Standards For Setting Aside A Labor Arbitration Arbitration Award In A Hybrid § 301[6] Action Are Clearly Explicated By The Decisions Of This Court

Petitioners argue that the decisions of this Court laying out the standards for setting aside a labor arbitration award in a hybrid § 301 action are "confusing". Such argument is inane and stems from the same fault demonstrated by Petitioners' bogus claim that the decision of the Sixth Circuit is in conflict with the decisions of other Courts of Appeals. Petitioners simply pay no

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[6]29 U.S.C. § 185.

attention to the issues actually presented to and decided by the courts.

In *Hines v. Anchor Motor Freight, Inc., supra*, this Court held that, notwithstanding an arbitration award in favor of the employer, a suit against the employer asserting breach of a collective bargaining agreement was improperly dismissed where an action against the union for breach of duty of fair representation had withstood a motion for summary judgment and remained to be tried. *Hines, supra*, 424 U.S. at 556, 572. The court of appeals had affirmed a grant of summary judgment in favor of the employer on the grounds that the arbitral finality provision of the collective bargaining had to be observed. *Hines v. Anchor Motor Freight, Inc.*, 506 F. 2d 1153, 1157 (6th Cir. 1974). This Court held, however, that when the union breaches its duty of fair representation in the arbitral process that breach removes the bar of arbitral finality and subjects the arbitration award to judicial review. *Hines, supra*, 424 U.S. at 567.

The fundamental error in Petitioners' argument is that they mistakenly equate removing the bar of arbitral finality with vacating a labor arbitration award without regard to whether the arbitration decision is erroneous. As stated in *United Parcel Service v. Mitchell, supra*, 451 U.S. at 61, this Court in *Hines* rejected the suggestion " '*that erroneous arbitration decisions*[7] must stand' in the face of the union's breach of its duty" of fair representation. Neither *Hines* nor any other decision holds or suggests that removing the bar of arbitral finality ipso facto serves to vacate a labor arbitration award whether or not the award is tainted by the union's breach of duty of fair representation.

Removing the bar of arbitral finality merely permits the court to review the merits of the arbitration award. The court must then determine whether, contrary to the arbitrator's decision, the employer breached the collective bargaining agreement and whether there is substantial reason to believe that a union

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[7]Emphasis added.

breach of duty contributed to the erroneous outcome of the arbitration proceedings. *Hines*, *supra*, 424 U.S. at 568. In the context of the facts in *Hines*, the Court thus held that —

> Petitioners, if they prove an *erroneous* discharge *and* the Union's breach of duty *tainting the decision* of the joint committee, are entitled to an appropriate remedy against the employer as well as the Union. *Hines*, *supra*, 424 U.S. 572 (Emphasis added).

The above-quoted holding lays down the standards for vacating a labor arbitration award in a hybrid § 301 action in plain and simple terms. Upon judicial review of a labor arbitration award, if the court finds that the arbitrator's decision is *erroneous* and that the union's breach of duty of fair representation tainted the decision, then the erroneous arbitration decision cannot stand and a remedy may be had against both the employer and the union.

Contrary to Petitioners' convoluted and spurious argument, there is no inconsistency among this Court's decisions in *Hines*, *supra*, *Mitchell*, *supra*, and *Del Costello*, *supra*. As hereinbefore noted, in *Mitchell*, the court stated that *Hines* held that the usual rule of arbitral finality should not be applied to shield "erroneous arbitration decisions." *Mitchell*, *supra*, 451 U.S. at 61. And in *Del Costello*, *supra*, 462 U.S. at 165, this Court stated that to prevail against either the company or the union in a hybrid § 301 action, the employee-plaintiff must not only show that the union breached its duty of fair representation but also that the company breached the collective bargaining agreement, i.e., that the arbitrator's decision was erroneous. The opinions of this Court, insofar they bear on the issues in this case, are consistent and of single import.

Petitioners' argument that a labor arbitration award, whether or not erroneous, should be vacated based solely on a union's breach of duty of fair representation is nonsensical. Neither federal labor law policy nor just plain common sense dictate or suggest that a labor arbitration award should be set aside if it is not erroneous. Such suggestion is not only absurd but also would

make a shambles of the arbitration model judicially recognized as national labor policy.

II

On The Record In This Case The Sixth Circuit Properly Held That The Union's Breach Of Duty Of Fair Representation Did Not Taint The Decision Of The Arbitrator

The Sixth Circuit found that there is "no evidence" in the record in this case that the Union's breach of duty of fair representation tainted the arbitrator's decision.[8] Appendix, p. 14a. It also found that Petitioners' position was fully presented to the arbitrator by their own attorneys, who were permitted to examine witnesses, offer evidence and participate fully in the hearing before the arbitrator. Appendix, p. 14a.[9] Given that the record reveals no evidence that the Union's breach of duty tainted the outcome of the arbitration proceeding coupled with the undisputed finding that Petitioners' attorneys fully presented their position to the arbitrator, as a matter of simple logic it follows that "[a]ny breach of the Union of its duty of fair representation therefore could not have tainted the decision of the arbitrator." Appendix, p. 14a-16a.

Contrary to Petitioners' assertion, the Sixth Circuit did not hold as a matter of law that a union's breach of the duty of fair representation is rendered harmless in any instance where the plaintiff-employee is represented by his own counsel in an arbitration hearing. The Sixth Circuit's holding is clearly based on and limited to the record in this case.

Petitioners' contention that the Sixth Circuit's holding is in conflict with three other circuits is without merit. As appears to

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[8]Petitioners make no attempt to contest this finding in their Petition For Certiorari.

[9]Petitioners do not contest this finding in their Petition For Certiorari.

be Petitioners' bent, this contention is fabricated by lifting statements out of context from court decisions and weaving them into a self-serving argument.

Petitioners assert that in *Edwards v. Capital Airlines*, 176 F. 2d 755 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 885, "the Court agreed with plaintiffs that a grievance board decision was not binding on them, even though they had been represented by their own attorneys". (Petition For Certiorari, p. 18). The D.C. Circuit did not hold that the grievance board decision therein involved was not binding on the plaintiffs. The court held only that under the circumstances therein involved the grievance board decision was not "immune from judicial examination" and remanded the case to the district court with instructions to review the award. *Edwards supra*, 176 F. 2d at 762.

The plaintiffs in *Edwards* were non-union employees whose seniority placement by the company was contested by union members. The company had no actual concern in the controversy. The dispute was submitted to a grievance board composed of two representatives of the company and two representatives of the union of the employees. The union assumed the representation of its members and was actively an adversary party vis-a-vis the plaintiffs. The court held that "under this combination of circumstances" the final and binding clause of the contract could not prevent the non-union plaintiffs from securing a judicial review of the adverse arbitration award. *Edwards, supra*, 176 F. 2d at 761.

There is no similarity between the issues presented and decided in *Edwards* and in the instant case. Therefore, there is no conflict between the decision in *Edwards* and the decision of the Sixth Circuit in this case.

The claim of Petitioners that the Sixth Circuit's decision is in conflict with the "decision" in *Hiller v. Liquor Salesmen's Union Local No. 2*, 338 F. 2d 778 (2nd Cir. 1964) demonstrates a lack of attention to the facts and holding in *Hiller*. *Hiller*, unlike the instant case, was not a hybrid § 301 action and no arbitration award was involved. In *Hiller*, the administrators of a decedent

employee's estate brought an action for damages against the union and the company based on a claim of a conspiracy between the union and the company to defraud the decedent employee. *Hiller, supra*, 338 F. 2d at 779. The district court stayed the action pending arbitration. The Second Circuit reversed, holding that "where the employee's case is based upon a conspiracy between his union and his employer to deprive him of his rights he cannot be forced to submit that issue to an arbitration between the employer and the union." *Hiller, supra*, 338 F. 2d at 779.

By way of dictum, the *Hiller* court stated that the district court's order for the plaintiffs to have separate representation at an arbitration would not "cure the defects" inherent in that arrangement since the plaintiffs would be aligned on one side of their adversary, the union. *Hiller, supra*, 338 F. 2d at 779. Neither the "decision" nor the dictum statement alluded to by Petitioners is in conflict with the Sixth Circuit's decision in this case.

Contrary to Petitioners' contention, there is patently no conflict between the decision of the Sixth Circuit and the decision in *Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO v. Michelson's Food Service, Inc.*, 545 F. 2d 1248 (9th Cir. 1976). In *Michelson's*, an employee claimed that his employer underpaid him in violation of a collective bargaining agreement. The employee contended that he should not be required to arbitrate his claim because the union would not properly represent him.

The Ninth Circuit rejected the employee's contention and held that he must submit his claim to arbitration. The court stated that the employee could "participate fully, in person and by counsel, and protect his own interests". *Michelson's, supra*, 545 F. 2d at 1252. The court further stated that although the arbitration award would be prima facie binding, the employee could come into court and attack the award on the grounds that it was "the result of the union's bad faith, fraud or collusion". *Michelson's, supra*, 545 F. 2d at 1252. But the court noted, "[i]f he losses on

that issue, that will terminate his case." *Michelson's, supra*, 545 F. 2d at 1252.

In short, the *Michelson's* court held that whether or not the employee was represented by his own counsel in the arbitration proceeding he could attack the arbitration award on the grounds that the union's breach of duty tainted the result of the arbitration proceeding. The court held, however, that if he could not show that the union's breach of duty tainted the arbitration decision, his case would terminate and the court could not consider the merits of his claim. *Michelson's, supra*, 545 F.2d at 1252.

The Sixth Circuit did not hold that Petitioners could not attack the labor arbitration award in the instant case because they were represented by their own counsel in the arbitration proceeding. The court held that because the Petitioners' position was fully presented by their own counsel and there was no evidence in the record to show that the arbitration award was tainted by any union breach of the duty of fair representation, their attack on the arbitrator's award was without merit. And since their attack on the arbitrator's award was without merit, the court could not set aside the arbitrator's award and entertain their claim that Kroger breached the collective bargaining agreement. The Sixth Circuit's decision is in complete accord with the decision in *Michelson's*.

Petitioners have not presented any legitimate basis for review of the Sixth Circuit's decision in this case.

III

The Sixth Circuit Court Of Appeals Did Not Reach The Question Of Whether Petitioners Were Entitled To A Jury Trial And There Is No Reason For This Court To Review That Question

Petitioners assert that "all the issues in this case were submitted to a jury" (Petition For Certiorari, p. 21). This statement is incorrect. The critical issues attendant to Petitioners' actions for a remedy against Kroger and the Union are: 1)

whether the arbitrator's decision is erroneous and 2) whether the Union's breach of duty of fair representation tainted the arbitrator's decision. *Hines v. Anchor Motor Freight, Inc.*, *supra*, 454 U.S. at 572. Neither of these issues was submitted to a jury.

The Sixth Circuit did not rule on the question of whether Petitioners were entitled to a jury trial on the merits of their claims against Kroger and the Union. Petitioners could not maintain an action on the merits of their claim against Kroger for alleged breach of the collective bargaining agreement unless they proved that the arbitrator's award was erroneous and that the Union's breach of the duty of fair representation tainted the arbitrator's decision. *Hines*, *supra*, 424 U.S. at 572. Since the evidence of record showed that Petitioners failed to carry this burden of proof, there was and is no purpose to be served by deciding whether they are entitled to a jury trial on the merits of their actions.

This Court does not ordinarily consider questions not passed on by the court below. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984).[10] That policy is aptly suited to the instant case. Whether Petitioners were entitled to a jury trial on the merits of their action against Kroger is academic because there is no basis on which the court could set aside the arbitrator's award[11] and thus Petitioners could not prevail against either Kroger or the Union in any event. *Hines*, *supra*, 424 U.S. at 572.[12]

Inasmuch as the Sixth Circuit did not rule on the issue of whether Petitioners were entitled to a jury trial, Petitioners' contention that "[T]he Sixth Circuit's decision in this case

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[10]Also, this Court has stated that it reviews judgments, not statements in opinions. *Black v. Cutter Laboratories*, 353 U.S. 292, 297 (1956).

[11]Whether the arbitrator's award could be set aside is a question of law for the court's determination.

[12]As Judge Contie stated in his concurring opinion, "only if *the court* concluded th. . . the arbitration award had to be set aside, which we hold today it could not have been, should it have tried the breach of contract claim to a jury." Appendix, p. 22a. Emphasis added.

conflicts directly with decisions in three other Circuits" (Petition For Certiorari, p.21) is patently absurd. Moreover, the cases alluded to by Petitioners as being in conflict with the Sixth Circuit's "non decision" in this case are inapposite to the instant case.

In *Cox v. C.H. Masland & Sons, Inc.*, 607 F. 2d 138 (5th Cir. 1979) there was no arbitration award involved. The plaintiff brought an action against his union and the employer because the union had refused to take to arbitration his case against the employer for breach of the collective bargaining agreement.

Roscello v. Southwest Airlines Co., 726 F. 2d 217 (5th Cir. 1984) was not a hybrid § 301 action, as is the instant case. There was no claim of breach of a collective bargaining agreement and no arbitration award involved. The plaintiff's action against the employer was predicated on his claim that the employer discharged him for engaging in union activity in violation of the Railway Labor Act, 45 U.S.C. § 151. *Roscello, supra*, 726 F. 2d at 219, 220.

Quinn v. Digiulian, 739 F. 2d 637 (D.C. Cir. 1984) is also not a hybrid § 301 action. In that case, the plaintiff brought an action against the union and two of its officers for allegedly harassing him because he decided to run as a candidate for union office against an incumbent. No employer was involved in *Quinn*, there was no claim of breach of a collective bargaining agreement and no arbitration award was involved.

Minnis v. International Union U.A.W., 531 F. 2d 850 (8th Cir. 1975) is not a hybrid § 301 action. The district court had ruled in favor of the employer, and the plaintiff pursued his action against the union for breach of duty of fair representation in failing to adequately present a grievance to the employer.

None of the above cases cited by Petitioners address or decide the issue pertinent to the instant case, i.e., whether a plaintiff-employee is entitled to a jury trial on a claim against his employer for breach of a collective bargaining agreement when an

arbitration award stands between the employee and any judicial remedy against the employer and there is no grounds for vacating the arbitration award.

Whether or not Petitioners were entitled to a jury trial on the merits of their claims in this case, the judgment of the Sixth Circuit must stand. There is therefore no reason to address the question posed by Petitioners.

CONCLUSION

In this case, an arbitration award stands between Petitioners and any relief which may be awarded against Kroger. Petitioners were required to prove that the arbitrator's award was erroneous and that the Union's breach of duty of fair representation tainted the arbitrator's decision before they were entitled to reach the merits of their breach of collective bargaining agreement claim against Kroger. Petitioners simply failed to carry their burden of proof and, as correctly held by the Sixth Circuit, were not entitled to prevail against either Kroger or the Union.

There is here presented no conflict with an analogous decision of any other Circuit Court of Appeals, no important question of federal law which should be settled by this Court and no conflict with applicable decisions of this Court. The Petition For Certiorari should be denied.

Respectfully submitted,

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Dated: May 29, 1987

No. 87-1759

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

KENNETH WOOD, et al.,
Petitioners

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, ET AL,
Respondents

APPENDIX

Court of Appeals Opinion

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 85-1880/1963/1964

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENNETH WOOD, JEFFERY FANSLER, CHARLES BOHNER, et al.,
Plaintiffs-Appellants, (85-1880)
Respondents-Appellees,
(85-1963/64),

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, et al.,
HAMADY BROS., FOOD MARKETS, INC.,
Defendants-Appellees, (85-1880)

KROGER COMPANY,
Petitioner-Appellant, (85-1963),

GENERAL TEAMSTERS UNION LOCAL 406,
Petitioner-Appellant, (85-1964).

ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed December 15, 1986

Before: KEITH and KENNEDY, Circuit Judges; and CONTIE, Senior Circuit Judge.

KENNEDY, Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. CONTIE, Senior Circuit Judge, (pp. 20-22) delivered a separate concurring opinion.

KENNEDY, Circuit Judge. Petitioners-appellants Kroger Company ("Kroger") and General Teamsters Union Local 406 ("the Union") appeal from a jury verdict and various interlocutory orders entered by the District Court for the Western District of Michigan in an action brought by respondents-appellees, former employees of Kroger, ("plaintiffs") under Section 301(a) of the Labor Management Relations Act. Plaintiffs appeal from the District Court decision granting the motion of defendant-appellee Hamady Brothers Food Markets ("Hamady") to dismiss. The plaintiffs' action before the District Court was based on three claims: 1) breach of the duty of fair representation by the Union;-2) breach of the collective bargaining agreement ("the contract") by Kroger; and 3) successor liability of Hamady. For the reasons stated below, we affirm the District Court's dismissal of Hamady and reverse the Court's denial of Kroger's and the Union's motions for judgment notwithstanding the verdict.

I. FACTS AND PROCEEDINGS BELOW

Plaintiffs' action arose out of Kroger's lease/sale of one of its warehouses to Hamady. Plaintiffs, 38 former Kroger warehouse employees, only one of whom was hired by Hamady, were represented by the Union at the time of the transfer.[1] The terms and conditions of their employment were controlled by a collective bargaining agreement between Kroger

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[1]The one employee hired by Hamady alleged a loss of wages and benefits.

and the Union. Section 1.3 of the contract provided that "[t]his Agreement shall be binding not only upon the parties hereto but upon their successors and assigns." Collective Bargaining Agreement, Joint Appendix at 557. The agreement also established a grievance procedure, which was the exclusive mechanism for resolving disputes over the interpretation or application of the contract. The final, and binding, step of the procedure was arbitration. *Id.* at 564.

Kroger is an Ohio corporation, with operations in twenty-four states. In the spring of 1980, Kroger decided to sell its Michigan stores because they were not profitable. Arrangements were made to sell the stores to Hamady. On August 6, 1980, Hamady and Kroger entered into a separate agreement regarding the warehouse. The agreement provided that Kroger would lease the warehouse to Hamady for seven years, at the end of which time Hamady would purchase the warehouse. Kroger would also lease the equipment in the warehouse to Hamady for thirty-six months, with the provision that Hamady would purchase the equipment at the end of that period. Finally, Kroger and Hamady entered into a service agreement under which Hamady would provide Kroger stores with groceries and produce until October 4, 1980, with renewal options which could extend until January 3, 1981.

During the negotiations between Hamady and Kroger, Kroger representatives notified Hamady representatives of the collective bargaining agreement, and particularly of the successors and assigns clause. Mr. Hirsch, a Kroger representative, informed the Hamady representatives that the warehouse employees were a good group of people and that the dealings with the Union had been good. Joint Appendix at 824-25. A Union official testified that, in turn, Mr. Hirsch told the Union official that he did not think there would be a problem in terms of Hamady's assumption of the contract. In a letter dated September 23, 1980, a Union official informed Kroger that if Hamady did not assume the contract, the Union would hold Kroger responsible for any damages to the employees.

At the time of the announcement of the lease/sale to Hamady, the Union met with Hamady officials to determine the effect of the transfer on the employees. There was some discussion of the seniority rights of the employees. In a meeting on September 15, 1980, Mr. Griffin, a Hamady official, stated in response to Union inquiries that Hamady intended to do its hiring exclusively from the Kroger employee roster. Hamady officials understood that Kroger was happy with its workforce at the warehouse. Mr. Griffin also told the Union that Hamady would make an effort to take seniority into consideration. At the same meeting, the Hamady officials informed the Union representatives that they would not accept the collective bargaining agreement. *Id.* at 379-80. In a letter dated September 22, 1980, the attorney for the Union acknowledged to the Union that Hamady was probably not bound by the Kroger contract. Joint Appendix at 861-62.

The sale of the warehouse was announced to the employees in a meeting held on August 7, 1980. On September 27, 1980, a second meeting was held in order to answer questions regarding the employees' contract. At this meeting, Mr. Griffin, the Hamady official, informed the employees that Hamady would not adopt the contract and would not necessarily hire in order of seniority. Thereafter, the warehouse employees were interviewed and given physical examinations. Hamady posted the list of employees who would be hired. Hamady hired approximately half of the employees of the warehouse, but did not do so in order of seniority. On October 20, 1980, Kroger ceased operations at the warehouse and transferred the assets to Hamady.[2]

Hamady did recognize the Union as the exclusive bargaining agent for its new employees. After the meeting on September 27, Hamady officials engaged in bargaining with the Union. A new agreement governing the warehouse employees

[2]Due to unfavorable economic conditions, Hamady ceased operations one year later in October of 1981.

was reached on November 10 and ratified on November 22. The new collective bargaining agreement included many of the same provisions as the previous contract.

In early October, a former employee filed a grievance with the Union, claiming that Kroger and/or Hamady had violated the collective bargaining agreement. On that same day, the Union filed a grievance asserting that the agreement should be binding on Hamady and that Kroger had the obligation to see that Hamady assumed the contract. These grievances were denied at the Step 1 and Step 2 grievances. In addition to their request that the Union file a grievance, the employees requested that the Union seek an injunction against the transfer of the warehouse. Judge Hoffius of the Kent County, Michigan, Circuit Court initially entered a temporary restraining order, but the order was later dissolved.

The employees filed suit in the Kent County Circuit Court on October 16, 1980, claiming that: 1) the Union had breached its duty of fair representation, 2) Kroger had breached the collective bargaining agreement by failing to bind Hamady to the collective bargaining agreement, 3) Hamady was liable as a successor to Kroger, and 4) Hamady had discriminated against the employees on several different bases. The discrimination claims were severed and are not at issue here. Kroger and the Union removed the case to the District Court. When the representatives hearing the Step 3 grievance deadlocked, Kroger demanded a rehearing on this step of the grievance procedure. The Union, however, refused to participate because it contended that such a rehearing was not authorized. In February, 1981, the Union filed a motion to compel Kroger to arbitrate the grievances. The District Court ordered Kroger and Hamady to arbitrate the issues. It also ordered that the interested employees be allowed to provide a spokesperson of their own to participate in the arbitration proceedings. The Court retained jurisdiction of the case pending completion of the arbitration process.

The arbitration hearing lasted four days. Plaintiffs were represented by their own attorneys, who participated fully in the hearing. Thus, they presented witnesses and evidence, cross-examined the witnesses of the other parties, and submitted briefs. The arbitrator chosen by the parties was Robert Howlett, an experienced and respected arbitrator. On January 8, 1982, he issued an opinion finding that Hamady was not a "successor" to Kroger and thus was not obligated to arbitrate, and that Kroger was not obligated to require Hamady to assume the contract. The arbitration award was binding, in accordance with the collective bargaining agreement.

After the arbitration award was issued, plaintiffs filed a motion for trial in the District Court. Kroger moved to strike plaintiffs' jury demand on the ground that a jury trial is not available in a hybrid section 301 action. The District Court denied this motion. In response to other motions, the Court also refused to certify the action as a class action and refused to permit the arbitrator to testify at the trial. It also rejected Kroger's motion for summary judgment.

The liability issues were bifurcated and tried first. During the trial, the plaintiffs offered evidence presented by Professor Summers, a labor law professor with experience arbitrating. This testimony was admitted over the objections of both Kroger and the Union. The witness presented evidence that an arbitrator may be influenced by signals given out by a union indicating that the union does not want to win the case. Joint Appendix at 355-63. The District Court refused to admit into evidence the arbitrator's decision and award although it did permit testimony relating to them.

Hamady moved for dismissal after the plaintiffs had presented all of their proof. Its motion was granted. The District Court found that Hamady was not a "successor" to Kroger, and was not obligated to assume the collective bargaining agreement. District Court Opinion, Joint Appendix at 197. Plaintiffs appeal from this dismissal. The District Court

denied Kroger's motion to dismiss on the ground that the expert witness presented evidence that the Union's conduct may have affected the arbitrator's decision, thus making it vulnerable.

The District Court submitted the following special interrogatories to the jury:

> 1. A. Did the Union violate its duty of fair representation by its conduct apart from the arbitration hearing with respect to the claims against Hamady?
>
> B. Did the Union violate its duty of fair representation by its conduct apart from the arbitration hearing with respect to the claims against Kroger?
>
> 2. A. Did the Union violate its duty of fair representation by its conduct during and related to the arbitration hearing with respect to the claims against Hamady?
>
> B. Did the Union violate its duty of fair representation by its conduct during and related to the arbitration hearing with respect to the claims against Kroger?
>
> 3. A. If your answer to Question 2A was "yes," did such violation seriously undermine the integrity of the arbitration process as that process related to the claims against Hamady?
>
> B. If your answer to Question 2B was "yes," did such violation seriously undermine the integrity of the arbitration process as that process related to the claims against Kroger?
>
> 4. Did Kroger violate the successors and assigns clause by transferring the warehouse to Hamady without requiring Hamady to assume the collective bargaining agreement as a condition of the sale?

Joint Appendix at 215-16. The District Court instructed the jury that if it found that the Union had breached its duty

and that that breach had undermined the arbitration process, it should determine whether Kroger breached the collective bargaining agreement. The jury found both that the Union had breached its duty and that that breach had undermined the arbitration process. It then found that the collective bargaining agreement obligated Kroger to require Hamady to assume the agreement.

Kroger and the Union both moved for judgment notwithstanding the verdict, or, in the alternative, a new trial. The District Court denied these motions. District Court Opinion, Joint Appendix at 218. It stated that there was sufficient evidence to show that the Union had breached its duty, both apart from and during the arbitration hearing, and that this breach had undermined the entire arbitration process. Furthermore, the Court found that the jury's interpretation of the term "successor" was supported by the evidence. On the petition of Kroger and the Union, the District Court certified the following five questions pursuant to 28 U.S.C. § 1292(b):

> 1. Whether the Court properly ruled that plaintiff had a right to a jury trial in this case;
>
> 2. Whether, given the Court's determination that Hamady was not a successor under federal labor law, the jury could properly find a breach by the union of its duty of fair representation with respect to Hamady;
>
> 3. Whether there can be any recovery for Union conduct apart from the arbitration hearing regarding claims against Kroger or against Hamady;
>
> 4. Whether the jury was properly instructed regarding the standard that must be met by plaintiffs before the jury could find that the arbitrator's decision should be set aside; and
>
> 5. Whether the Court properly instructed the jury regarding the jury's interpretation of the Kroger-Local 406 contract.

Joint Appendix at 258.

This Court granted permission to appeal. These claims of Kroger and the Union, as well as plaintiffs' appeal from the dismissal of Hamady, are now before us.

II. HAMADY'S DISMISSAL

At the close of plaintiffs' case, the District Court granted Hamady's motion for dismissal, finding that plaintiffs had not "made out a case against Hamady." District Court Opinion at 4, Joint Appendix at 200. The Court found no evidence to indicate that Hamady was an alter ego, that Hamady had assumed the collective bargaining agreement, or that there was common ownership or control of the two companies. The Court found, "[e]ven using the stricter standard of scrutiny required when considering a motion for a directed verdict," that Hamady was not bound by the collective bargaining agreement. *Id.* We affirm the judgment of the District Court.

The Court addressed in turn each of the three exceptions to the general rule that a new employer cannot be held to the terms of a former employer's collective bargaining agreement. First, the Court found that Hamady was not an "alter ego" of Kroger. The United States Supreme Court has stated that a new employer may be bound by the terms of the former employer's contract if the new employer is found to be "merely a disguised continuance of the old employer." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n.5 (1974) (citing *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). An "alter ego" will be found only in cases "involv[ing] a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws." 417 U.S. at 259 n.5. The District Court correctly found that this case is not such a case and that the two corporations are "distinct corporate entities." District Court Opinion at 10, Joint Appendix at 206.

The District Court next considered whether Hamady had expressly or impliedly assumed the contract. The Court found that Hamady's answers to the employees' questions regarding its assumption of the contract were equivocal at best. In addition, "even if silence *could* be construed as acceptance in this context, Hamady was not silent for long." District Court Opinion at 12, Joint Appendix at 208. In fact, plaintiff Wood admitted in the verified complaint he filed with the Circuit Court for Kent County that Hamady had announced it would not adopt the contract: "Notwithstanding the successors and assigns clause of the labor Contract ..., Hamady has stated that it will not adopt the Contract." Joint Appendix at 35. The District Court found that plaintiffs did not present any evidence to indicate assumption of the contract, and that in fact, Hamady had expressly renounced the agreement.

The third circumstance in which a new employer may be held bound by its predecessor employer's contract is where there is "substantial continuity" of business operations, resulting in successor liability on the part of the new employer. Three Supreme Court cases address successorship in this context. *See Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974); *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972); *John Wiley and Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). These cases must be read together to understand the distinguishing criteria in this area. The District Court found that, under these three cases, Hamady was not liable as a successor.

In *Wiley*, a union brought an action to compel arbitration under a collective bargaining agreement adopted by the predecessor company. The new company had acquired the original company by merger. On these facts, the Supreme Court held that "the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement." *Wiley*,

376 U.S. at 548. The Court limited this holding when it stated: "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives." *Id.* at 551. Where there is a lack of "substantial continuity of identity in the business enterprise," the Court acknowledged that the duty to arbitrate may not survive. *Id.*

In *Burns* a corporation that had been providing security services was replaced by a corporation that had submitted a lower bid. The new employer hired twenty-seven of the original forty-two guards and brought in fifteen of its own. The case arose in the context of an unfair labor practice charge as opposed to an action to compel arbitration. The Court held that the successor employer had a duty to recognize and bargain with the union representing the original employees, but did not have an obligation to adopt the contract provisions. The Court stated that, where the majority of employees after the change had been previously employed by the predecessor employer, the new employer must bargain with the union. *Id.* at 281. In refusing to hold the successor employer bound by the prior agreement, the Court pointed out a significant difference between *Burns* and *Wiley*: "Its [*Wiley*'s] narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation." *Id.* at 286.

Finally, in *Howard Johnson*, the Court addressed a situation in which the successor employer had not hired a majority of the original employees and the change of ownership was by means of a purchase of assets rather than a merger. The Court held that, under *Wiley*, there was no substantial continuity of identity in the business enterprise and thus no duty to arbitrate. *Howard Johnson*, 417 U.S. at 263-65. In addition to the failure of the successor to hire a majority of the original employees, the Court emphasized the differences between a merger and a purchase of assets. First it stressed that the origi-

nal employer fails to exist when two companies are merged, making it impossible for the employees to find relief if they cannot turn to the successor. Second, the Court mentioned that in the case of a merger, state law usually provides that the surviving corporation will assume the original company's obligations. *Id.* at 257-58. After *Howard Johnson,* there must be continuity in terms of both the workforce and the operations in order to find successor liability under the collective bargaining agreement.

The District Court correctly observed that the application of the "substantial continuity" test is fact specific. Joint Appendix at 209. Although Hamady did hire fifty-one percent of the former Kroger employees, the Court found, on the basis of the facts of the case now before this Court, that the distinctions between this case and *Wiley* were controlling. The Court stressed the facts that Kroger, the original employer, did not disappear; that state law provides for no assumption of obligations by a purchaser of assets; and that there were significant differences in the operations of Kroger and Hamady. Joint Appendix at 210-11. The transaction between Kroger and Hamady was an arms length transaction. Finally, the District Court added that policy considerations favored Hamady in this case. The Kroger warehouse was failing and Hamady knew substantial changes would have to be made for it to be made profitable. The Court found that if Hamady had known it would have to adopt the contract, it would not have purchased the warehouse at all. District Court Opinion at 16-17, Joint Appendix at 212-13.

We affirm the District Court's decision finding that Hamady was not bound by the collective bargaining agreement between Kroger and the Union and granting Hamady's motion to dismiss.

III. KROGER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Petitioner Kroger raises three claims on interlocutory appeal. First, it claims that the District Court erred in failing

to strike the plaintiffs' jury demand, thus allowing the jury to substitute its interpretation of the collective bargaining agreement for that of the arbitrator. Second, Kroger asserts that the arbitration award cannot be set aside unless there is a finding that the Union breached its duty of fair representation and that this breach tainted the arbitrator's decision. Third, Kroger claims that the Court erred because it failed to instruct the jury on the interpretation of the term "successor" under federal labor law. This Court finds that there was no evidence that any breach of the Union of its duty of fair representation tainted the arbitrator's decision. Thus, we do not reach Kroger's first and third claims. We reverse the District Court's denial of Kroger's motion for judgment as a matter of law and remand with direction to confirm the arbitration award.

A court may not review the merits of an arbitration decision, even when the basis for the decision is ambiguous, as long as the award draws its essence from the bargaining agreement. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598-99 (1960). Even in the event of a union's breach of its duty of fair representation, an arbitration award is not quickly set aside. Kroger correctly asserts that to vacate an arbitration award on this ground, there must be two findings. First, the Union must have breached its duty of fair representation to the employee. Second, the breach of duty by the Union must have tainted the arbitrator's decision. The breach must have contributed to the arbitrator's making an erroneous decision. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

In *Hines*, the Supreme Court held that if the union's breach of its duty of fair representation seriously undermines the integrity of the arbitration process, that breach also removes the bar of finality of the arbitration decision. *Hines*, 424 U.S. at 567. The question for the Court is whether there is substantial reason to believe that a union's breach of duty contributed to the erroneous outcome of the arbitration proceeding.

The Supreme Court concluded: "Petitioners, if they prove an erroneous discharge and the Union's breach of duty tainting the decision . . . , are entitled to an appropriate remedy against the employer." *Id.* at 572.

There was conflicting evidence presented to the jury in this case with respect to the breach by the Union of its duty of fair representation in the manner of its presentation of the grievance at the arbitration hearing. However, there was no evidence from which the jury could find that there was "substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings," assuming that the outcome was erroneous. *Hines,* 424 U.S. at 568. Here, plaintiffs' position was fully presented to the arbitrator by their own attorneys. These attorneys were permitted to examine witnesses, offer evidence and participate fully in the four-day hearing before the arbitrator.

Plaintiffs cite the Union's objections to evidence and testimony presented by plaintiffs, and claim that this conduct on the part of the Union undermined the entire arbitration process. The number of objections made by a party, however, is irrelevant to the arbitrator in making his decision. Plaintiffs had ample opportunity to correct any erroneous assertions made by the Union and to compensate for its behavior. Plaintiffs' independent attorneys insured that plaintiffs' interests were fairly represented. Any breach by the Union of its duty of fair representation therefore could not have tainted the decision of the arbitrator.

Plaintiffs assert that the Union signalled to the arbitrator that it did not desire to win the case. They claim the Union accomplished this by objecting to plaintiffs' evidence and by permitting the arbitrator to see a letter from the Union attorney to the Union opining that the Union had only a fifty-fifty chance of winning the grievance. Plaintiffs had attempted to present to the arbitrator their claim that the Union had breached its duty of fair representation in not taking stronger

steps to get seniority in the contract with Hamady. In defense of that claim, the Union intended to show that it had relied on counsel's opinion that it was unlikely that Hamady was bound by the successor and assigns clause when bargaining with Hamady. The arbitrator declined to hear the unfair representation claims. An exhibit including the letter was left with the arbitrator and returned by him. The circumstances permit an inference that he may have seen the letter. Plaintiffs presented an expert witness, experienced in arbitration, who testified that signals by the Union that it didn't want to win would be likely to influence an arbitrator, although he also acknowledged that they might not and the arbitrator might indeed lean the opposite way. The essence of plaintiffs' claim is that the arbitrator did not decide the case on the basis of the evidence and law presented to him but on the basis of some signal from the Union. Plaintiffs are making an attack on the impartiality of the arbitrator. Whether the arbitrator was influenced by the Union's signals is a question relating to bias or prejudice on the part of the arbitrator. There was no claim made at trial, however, that the arbitrator was biased or influenced by the Union. Expert testimony that some arbitrators may be influenced by union signaling does not permit the speculation that this arbitrator was so influenced where plaintiffs' own attorneys fully presented their case. There was no assertion that the arbitrator was anything but respectable, and his 82-page opinion appears to be thorough and supported by the evidence.

The evidence proffered by plaintiffs to prove that the arbitration award should be set aside does not support the requisite claim that the Union's breach tainted the arbitrator's decision, but instead goes to an issue not raised, specifically the neutrality of the arbitrator. We reverse the District Court's denial of Kroger's motion for judgment as a matter of law on the ground that there was insufficient evidence to justify vacating the arbitration award. The arbitrator's decision that Kroger did not violate the contract by failing to

require Hamady to assume the contract is binding on the parties.

IV. THE UNION'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The Union argues that its conduct was not the but-for cause of any loss suffered by plaintiffs and that it therefore cannot be found liable to plaintiffs for breach of the duty of fair representation. The District Court, denying the Union's motion for judgment notwithstanding the verdict, found that there was sufficient evidence to support the findings of the jury that the Union violated its duty both apart from and during the arbitration. We hold that the Union is not liable to plaintiffs for any form of damages, including attorneys' fees, and we reverse the District Court's denial of the Union's motion for judgment as a matter of law.

Plaintiffs claim that the Union breached its duty of fair representation with respect to its representation of their claims against Hamady and Kroger both apart from and during the arbitration. Where the alleged breach relates to the arbitration, an employee will not be entitled to recover from a union if the union's breach did not lead to injury. A court will not award sanctions that are solely punitive against a union. In *Hines v. Anchor Motor Freight, Inc.*, the Supreme Court stated: "To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Hines*, 424 U.S. at 570-71. *See also United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62 (1981); *Clayton v. United Automobile Workers*, 451 U.S. 679, 683 n.4 (1981). This Court has similarly held that a union owed no damages to a plaintiff if the employer did not act wrongfully. *St. Clair v. Local Union No. 515, Int'l Brotherhood of Teamsters*, 422 F.2d 128, 132 (6th Cir. 1969). In the case before this Court, therefore, plaintiffs must prove both the breach of duty and the wrong of the

employer that resulted in their loss. We have dismissed plaintiffs' claims with respect to both Hamady and Kroger. Because, as found by the arbitrator, there was no breach of the collective bargaining agreement and no injury to plaintiffs, we find no liability on the part of the Union with respect to its representation of their claims during the arbitration proceeding.

With respect to conduct apart from the arbitration, the Union is liable for damages only if its breach was a "but-for" cause of those damages. "[C]ourts have held unions not liable for breaches of their duty of fair representation absent evidence that but for the union's conduct the employee would not have been injured." *Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574, 580 n.8 (8th Cir. 1981). The Court of Appeals for the Third Circuit also summarized the applicable law relating to a union's breach of duty in this situation: "[T]he federal courts have consistently required a direct nexus between breach of this duty and resultant damages to the individual or minority segment as an element of liability." *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977).

In support of their claim of breach of the duty of fair representation, plaintiffs submit numerous acts of the Union conducted apart from the arbitration and other actions it failed to take. They claim, among other things, that the Union failed to keep its members advised as to the negotiations with Hamady, failed to make reasonable efforts to require Hamady to honor the contract, negotiated a new deal with Hamady considering solely its own interests, and harassed plaintiffs. Supplemental Complaint, Joint Appendix at 80-84. In order to recover against the Union, plaintiffs must demonstrate that Hamady would have adopted the contract and that they would not have been injured had the Union not breached its duty. *See Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir. 1986) (affirming grant of summary judgment against employees because plaintiffs could not

establish that the employer would have given in to their demands).

We can only speculate whether Hamady would have hired the employees by seniority in accordance with the contract if the Union had performed all the acts and refrained from all the acts which plaintiffs claim it should have. Plaintiffs presented no evidence to establish this causal connection between the Union's alleged breach and their alleged injuries. We hold that the Union is not liable to plaintiffs with respect to its representation of their interests apart from the arbitration.

Plaintiffs finally claim that they are entitled to the expenses they incurred because the Union would not fairly represent them in the arbitration proceeding. These expenses consist of attorneys' fees due the counsel that represented the plaintiffs in the four-day hearing. Plaintiffs assert that because the Union failed to fairly represent their interests, plaintiffs hired their own outside counsel and thus were damaged to the extent of the attorneys' fees. Plaintiffs contend that the Union's breach caused damage that is independent of the claims against Kroger and Hamady and that they should be able to recover these expenses regardless of the outcome of their grievance.

Several courts have held that an employee may recover attorneys' fees even where the outcome of the arbitration favored the employer. In *Del Casal v. Eastern Airlines, Inc.*, the union's refusal to process the claims of an employee was found to be a breach of its duty. *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981). Although the claim of wrongful discharge was decided in favor of the employer, the court awarded attorneys' fees to the plaintiff. The court stated that "[h]ere, the damage caused by the union was the attorney's fee which Del Casal incurred as a result of the union's breach." *Id.* at 301. Citing *Del Casal*, the Court of Appeals for the First Circuit held that a union was liable only for the increase in damages to the

plaintiff that it brought about. It stated, however, that "[t]hese additional damages—apparently consisting of additional legal costs—were incurred ... whether or not [the plaintiff] won on the merits of his grievance." *Stanton v. Delta Airlines, Inc.*, 669 F.2d 833, 838 (1st Cir. 1982). Similarly, the Court of Appeals for the Ninth Circuit has held that an employee is entitled to attorneys' fees incurred because he is forced to represent himself. *See Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983).

Claims for attorneys' fees in cases such as this one must be examined on a case-by-case basis. We decline to follow the circuits that have granted recovery of damages in the form of attorneys' fees where the plaintiff did not prevail on the merits of the grievance. The Union is intended to serve as the exclusive agent for the member employees and employees should be discouraged from pursuing their claims independently. Moreover, it is against "sound judicial policy to encourage actions to recover only the costs of litigation where no underlying right can any longer be vindicated in the action." *Badon v. General Motors Corp.*, 679 F.2d 93, 98 (6th Cir. 1982). Granting attorneys' fees to each member employee who demonstrates a breach of the duty of fair representation but no injury will lead to frivolous actions. We hold that plaintiffs are not entitled to recover attorneys' fees from the Union.

V. CONCLUSION

We affirm the District Court's judgment granting Hamady's motion to dismiss. We reverse the Court's denial of petitioners-appellants' motions for judgment notwithstanding the verdict and we remand with direction to confirm the arbitration award.[3]

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[3]We do not reach the issue discussed by Judge Contie in his separate concurrence. However, we have no disagreement with his analysis.

CONTIE, Senior Circuit Judge. I concur in the majority's conclusion, reversing and remanding this case and agree with its analysis in reaching that conclusion. However, I would have resolved the important issue of whether the right to a jury trial exists in a hybrid action for breach of a collective bargaining agreement and breach of the duty of fair representation brought under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). In the present case, both the Union and Kroger moved to strike the plaintiffs' demand for a jury trial. The district court denied the motions and the plaintiffs' hybrid § 301 action was tried to a jury.

Generally, the right to a jury trial exists either under the Seventh Amendment or by statute. Clearly, no labor statute specifically grants the right to a jury trial in a hybrid § 301 action. Thus, the sole question is whether the right exists under the Seventh Amendment. That amendment states that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." The Seventh Amendment guarantees jury trials not only in actions known at common law, but also in actions created after passage of the Seventh Amendment "if the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (footnote omitted). Thus, whether a jury trial is available depends on the historical nature of the claim; a claim "legal" in nature is generally triable to a jury where an "equitable" claim is not.

In determining whether the right to a jury trial exists for a newly-created action, the focus is "on the nature of the *issue* to be tried rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (emphasis added, footnote omitted). Thus, resolution of the jury trial question turns on whether the issues involved are legal or equitable in nature. As the Supreme Court observed in *Ross*, "the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions [i.e., whether

that type of issue was customarily tried to a jury or court]; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.* at 538 n.10. This Circuit has recognized that the second of these elements is the most significant. *Hildebrand v. Board of Trustees*, 607 F.2d 705, 708 (6th Cir. 1979), *cert. denied*, 456 U.S. 910 (1982).

The individual issues presented in this case, as in any hybrid § 301 action, are whether the Union breached its duty of fair representation and whether the employer, Kroger, breached the collectively bargained labor contract. I would find that the fair representation issue is equitable in nature, and therefore not triable to a jury, because the primary relief sought for breach of the duty of fair representation is equitable. That is, in order to reach the breach of contract issue, the plaintiffs had to have the arbitration award set aside, which could only be done by proving that the Union breached its duty of fair representation and also seriously undermined the arbitration process. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). Setting aside an arbitration award is certainly an equitable remedy. Therefore, under *Ross*, the duty of fair representation claim would be considered equitable in nature.

However, considering the breach of contract issue separately from the fair representation issue, I would find that it is legal in nature and triable to a jury. A breach of contract claim customarily presents a legal issue and the remedy sought for this particular claim, damages in the form of backpay, is a legal remedy. Thus, I believe that under *Ross* the claim against Kroger was triable to a jury as a "legal" claim.[1]

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[1]In my opinion, these conclusions are not inconsistent with the Supreme Court's pronouncements in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Both cases involved § 301 hybrid actions, both involved statute of limitation questions, and in both the Court elaborated on the nature of hybrid § 301 actions. In *Mitchell*,

Accordingly, I would have held that the district court erred in denying in their entirety the motions to strike the plaintiffs' jury demand. In my opinion, the court instead should have granted the motions with regard to the fair representation claim and tried the issues inherent in that claim itself. Then, only if the court concluded that the arbitration award had to be set aside, which we hold today that it could not have been, should it have tried the breach of contract claim to a jury.

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the Court rejected the notion that a hybrid § 301 action could be characterized as a tort or contract action, stating that the action was "more analogous to an action to vacate an arbitration award than to a straight contract action." 451 U.S. at 62. In *DelCostello*, the Court maintained its view that a hybrid § 301 action is not analogous to a contract claim, but retreated from the "imperfect" view that it was analogous to an action to vacate an arbitration award. The Court instead analogized hybrid § 301 actions to unfair labor practice actions and therefore held applicable to hybrid § 301 actions the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act.

Neither *Mitchell* nor *DelCostello* apply in the present situation because both involved statute of limitation questions and therefore focused on the *overall* characterization of a hybrid § 301 action, rather than on the nature of the individual issues presented in such an action. Under *Ross*, the latter inquiry, and not the former, is clearly the proper focus in determining a Seventh Amendment question. *See Ross*, 396 U.S. at 538.

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No. 86-1759

In The

Supreme Court of the United States

October Term, 1986

KENNETH WOOD, et al,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, et al,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

There are six questions presented for review by this Court. Questions one, two and five pertain to Respondent, Local 406. Questions three and four pertain to Respondent, Kroger. Question six pertains to Hamady and is the only one addressed in this Brief. That question is restated more appropriately for review as:

Under what circumstances can a succeeding employer be liable for any of the substantive provisions of its predecessor's agreements?

DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Sup. Ct. R. 28.1, Respondent Hamady Bros. Food Markets, Inc. makes the following disclosure:

Respondent, Hamady Bros. Food Markets, Inc., is a Michigan corporation, and has no subsidiaries or affiliates. It is not publicly owned and no publicly owned corporation has a financial interest in the outcome of this litigation.

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COUNTER-STATEMENT OF THE CASE

Petitioners' statement of the case is in error in the following two particulars:

1. Petitioners state "In October, 1980, Kroger turned over operation of the warehouse to Hamady Bros. Food

Markets, Inc." Kroger did not "turn over" anything to Hamady. Hamady purchased the assets of 21 of 35 supermarkets of Kroger that were serviced by a warehouse in Kentwood, Michigan. In conjunction with these asset purchases, Hamady later agreed to purchase the real estate interest and inventory at the warehouse that serviced these 35 supermarkets.

2. In footnote 1, Petitioners state that Kroger and *Hamady* filed motions to strike plaintiffs' jury demand. Although Hamady's position has always been that plaintiffs were not entitled to a jury trial on the successorship issue, it was Kroger and *Local 406* that filed motions to strike plaintiffs' jury demand.

SUMMARY OF ARGUMENT

The obligation of a "successor" vis-a-vis the predecessors labor agreement is very fact specific and may take form in various duties. The successor may have a duty to recognize and bargain with the union or it may have a duty to arbitrate the effect of the transfer. The transfer agreements between Kroger and Hamady involved a straight sale of assets. There was no merger or other stock transaction. Kroger did not disappear. The agreement on the warehouse required Hamady to purchase the warehouse within 7 years; it was in the nature of a land contract with a required "balloon payment". Hamady and Kroger are totally unrelated corporate entities. Hamady hired 99 of the warehouse employees (51% of the prior Kroger workforce). Hamady bargained with the union

and negotiated a new contract. It did not have a concurrent burden of being involuntarily bound to the substantive terms of Kroger's collective bargaining agreement.

ARGUMENT

The Sixth Circuit approved of the District Court's finding that as a general rule unless the successor agrees to assume the existing collective bargaining agreement, it does not bind the successor in any manner. *Kenneth Wood, et al v. International Brotherhood of Teamsters, et al,* 807 F.2d 493, 498 (6th Cir. 1986). It went on to discuss and decide each of the three exceptions in Hamady's favor. It summarily disposed of the first and second exceptions, i.e., that Hamady was not the "alter ego" of Kroger and Hamady did not expressly or impliedly assume the contract. Petitioners concede the appropriateness of this ruling by not raising those issues in this court. It is the third exception with which they disagree, i.e., the "substantial continuity" of business enterprise.

Petitioners argue the Sixth Circuit decision in this case conflicts with decisions by other circuits as to "the relevant criteria for evaluating continuity." That is not true. Petitioners ignore the fact that a successor employer's obligation may take form in a variety of duties being imposed on it. There may be a duty to recognize and bargain with the union which represented the employees of the predecessor. This duty was recognized in *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972). *See also Fall River Dyeing & Finishing Corp. v.*

NLRB, No. 85-1208, slip op. (U.S. June 1, 1987). The successor, under other circumstances and a different set of facts, may be bound to arbitrate the effect of a transfer on the collective bargaining agreement. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974). The separate nature of these obligations depends on the facts of each case. This was recognized by the district court when it observed that the application of the "substantial continuity" test is fact specific. See page 29a of Petitioners' Appendix. It was recognized by the Sixth Circuit, 807 F.2d at 500, and more importantly this Court too has already determined that the analysis of a successorship case and the applicable principles are different, depending on *which* duty is to be imposed on a "successor":

> The question whether (a new employer) is a "successor" is simply not meaningful in the abstract . . . [T]he real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative? *The answer to this inquiry requires analysis* of the interest of the new employer and the employees and the policies of the labor laws *in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain* with the union, the duty to remedy unfair labor practice, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others.

Howard Johnson, 417 U.S. 249, 262, n. 9 (emphasis added).

It is crucial to recognize the separate nature of the above obligations. A successor's obligation to bargain does

not create a concurrent burden of being bound involuntarily to the substantive terms of its predecessor's collective bargaining agreement. *Burns,* at 291. Petitioners refuse to accept this distinction and continue to argue that under all circumstances a "successor" is bound by the predecessor's labor agreement.

Because Hamady hired its employees from the Kroger work force and because its operations at the warehouse were similar to those of Kroger, Hamady concededly was obligated to bargain with the Union that represented those employees. *Burns,* at 291. *See also Fall River,* at 12. Hamady, of course, did this and, in fact, reached an agreement with Local 406 on a new contract. Petitioners' Appendix at 24a-25a. Accordingly, that question—whether Hamady had an obligation to recognize and bargain with the Union—is not the issue. Although Petitioners apparently do not dispute this history, they continue to cite cases to this Court that rely on precedents dealing with whether a "successor" is obligated to *bargain* with the Union which represented its predecessor's employees in deciding whether an employer is *bound by the terms* of his predecessor's labor contract. Petitioners, using this reasoning, then argue there is a conflict with decisions by other Circuits. Petitioners then argue for this Court to borrow from these precedents as evidence of this "conflict" by other Circuits. This Court should not base its analysis on any duty to bargain precedents the Petitioners have cited. The real issue is not whether Hamady is a successor in terms of its duty to bargain, but whether Hamady, *as* successor, is obligated to assume the prior labor contract.

Petitioners have cited cases they claim to be at odds with the Sixth Circuit. *United Steelworkers of America*

v. Reliance Universal, Inc., 335 F.2d 891 (3rd Cir. 1964) was decided before *Burns* or *Howard Johnson* and does not represent that Circuit's post *Howard Johnson* position. In *Reliance*, Martin Marietta divested itself of an *entire* plant including "all machinery, equipment, raw material, reserves, trade names, contract rights, trade marks, and goodwill". *Id.* at 893. Martin Marietta sold its Bridgeville plant to Reliance as a "going concern". Accordingly, the *Reliance* court found a duty on Reliance to arbitrate grievances under the labor contract, but not to be involuntarily bound to its substantive provisions. Here, Kroger sold only the assets at its Kentwood facility; it was not transferred as a "going concern".

United Steelworkers of America v. United States Gypsum Co., 492 F.2d 713 (5th Cir. 1974) *aff'd on rehearing*, 498 F.2d 334, *cert. denied* 419 U.S. 998 (1974) was also decided before *Howard Johnson* and was denied for rehearing in a quarter page *per curium* opinion. 498 F.2d 334 (1974). In *Gypsum*, the successor hired "all but three" of its predecessor's employees (492 F.2d at 816); here Hamady hired a bare majority of 51%. Further, in *Gypsum*, the predecessor apparently disappeared as "all of its assets and property" were purchased. *Id.* Thus, *Gypsum*, like *Wiley*, is a case where, although not a merger, the predecessor disappeared and there was a "wholesale transfer of employees". Imposition of the contract against the successor was the only way for the *Gypsum* court to give any remedy. Here, Kroger remained a viable corporate entity. The Petitioners had an arbitral remedy against Kroger under the "successor" clause. See *Burns, supra.* The Petitioners arbitrated their grievances wherein they were represented by counsel of their own choosing. It was not neces-

sary to involuntarily force the labor contract on Hamady to provide Petitioners with a remedy. *Gypsum* does not represent a conflict between Circuits in the application of successorship principles.

The holding in *Boeing Co. v. International Association of Machinists & Aerospace Workers,* 504 F.2d 307 (5th Cir. 1974) is consistent with *Wiley, Burns* and *Howard Johnson.* Even in an arms length transaction a successor cannot be bound to its predecessor's contract simply by hiring a large enough portion of its predecessor's work force. *Wiley, Burns* and *Howard Johnson* allow this to happen only when the relationship between the predecessor and successor is one which would normally lead, under state law principles, to the imposition of the predecessor's obligations on the successor. Under Michigan law, a purchaser of assets is *not* so obligated. *Chase v. Michigan Telephone Co.,* 121 Mich. 631, 80 N.W. 717 (1899). Both circumstances must exist, i.e., state law requiring the successor to assume the general contractual obligations of the predecessor employer AND substantial continuity in the identity of the business enterprise.

General Teamsters Local No. 249 v. Bill's Trucking, Inc., 493 F.2d 956 (3rd Cir. 1974) is distinguishable because that case involved a sale of stock and not a sale of assets. In a stock transfer the employing entity remains the same after the sale. Also in a stock transfer there is no break, or hiatus, between the two legal entities. As the Court in *Bill's Trucking* said:

> "This is not to suggest, of course, that in every case a successor employer may properly be held to the provisions of his predecessor's labor contract." *Id.* at 963.

There is no uncertainty in the law of successorship, as Petitioners suggest, and there really is no conflict in its application by different Circuits. The conflict *appears* to arise because the facts of each case are different and "the application of the 'substantial continuity' test is extremely fact specific". Petitioners' Appendix at 29a. Also the duty to be imposed upon the succeeding employer is different.

Petitioners suggest the time is appropriate for this Court to revisit the issue of successorship because it has been 13 years since having done so. There are two reasons that is not true. First, the circumstances and facts of this case suggest there are no important reasons for granting certiorari. The facts of this case, evaluated under the trilogy of *Wiley, Burns* and *Howard Johnson,* lead to the clear and unmistakable conclusion that Hamady had a duty to bargain with Local 406 and they did just that. They had no duty to arbitrate nor to be involuntarily bound by the substantive provisions of Kroger's collective bargaining agreement with Local 406. Secondly, this Court recently revisited the successorship issue. In *Fall River, supra,* the buyer acquired assets of the seller and did part of the seller's former dyeing work. The buyer was comprised of one of the seller's former officers and one of its major customers. The buyer took advantage of the seller's assets and its work force. The buyer acquired the seller's plant, real property, equipment and some of its remaining inventory. The buyer hired 8 of 12 of seller's supervisors and 36 of 55 production workers for one shift of operation. Months later the buyer expanded to two full shifts. The same working conditions existed for the employees and over half of the buyer's business came from the seller's

customers. The buyer refused to recognize and bargain with the union and an unfair labor practice charge was filed. An Administrative Law Judge found the buyer to be a successor with a duty to bargain with the union. The National Labor Relations Board affirmed the Administrative Law Judge's decision, the Court of Appeals for the First Circuit enforced the Board's order and this Court affirmed. In doing so this Court revisited its *Burns* decision and said:

> We observed in *Burns* that, although the successor has an obligation to bargain with the union, it "is ordinarily free to set initial terms on which it will hire the employees of a predecessor," 406 U.S., at 294, and it is not bound by the substantive provisions of the predecessor's collective-bargaining agreement. *Id.* at 294
>
> • • •
>
> If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated.
>
> • • •
>
> We now hold that a successor's obligation to bargain is not limited to a situation where the union in question has been recently certified. Where, as here, the union has rebuttable presumption of majority status, this status continues despite the change in employers. And the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor. (footnote omitted) Slip Op. at 12-13.

Hamady does not contest this obligation and did recognize, bargain and reach an agreement with Local 406.

Wiley, Burns and *Howard Johnson* have clearly established successorship as a two-step process. The paramount criterion is the continuity of the work force. If there is no continuity, there is no duty to even bargain with the Union because without continuity there can be no successor. *Howard Johnson, supra.* However, just because a successorship is determined to exist does not mean that the successor must assume the obligations of the predecessor's labor contract. This Court has established the general rule that even because of continuity of the work force, a corporation is determined to be a successor and, therefore, obligated to bargain with the Union, this obligation does not extend to being bound involuntarily to the substantive terms of its predecessor's labor agreement.

———o———

CONCLUSION

Petitioners' failure to understand the firmly established principles set forth by this Court does not create a conflict by Circuits in its application. Under the guidelines of *Wiley, Burns* and *Howard Johnson,* a distinguished arbitrator in an advisory opinion found Hamady was not bound by the substantive provisions of the Kroger-Local 406 agreement as did the District Court and the Sixth Circuit Court of Appeals. There does not seem to be any misunderstanding in the application of those three cases. On this basis, the Petition for Writ of Certiorari should be denied.

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No. 87-1759

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH WOOD, *et al.*,
Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 406, KROGER COMPANY and HAMADY BROTHERS FOOD MARKETS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT TEAMSTERS LOCAL 406 BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners seek review on writ of certiorari of five questions, four of which are adequately addressed in the briefs in opposition filed by other respondents. Respondent Teamsters Local 406 does not address those questions. More particularly, because these issues also bear directly on the claims against this respondent the Union concurs in and adopts the position taken by respondent Kroger on the three restated questions addressed in its brief in opposition. This brief in opposition will address question four in the petition for writ of certiorari, the only question which pertains exclusively to petitioners' claims against respondent Teamsters Local 406.

Question four relates to petitioners' claim to recover damages from respondent Union in the form of voluntarily incurred attorneys' fees for their counsel's participation in an arbitration where union counsel had principal responsibility for presenting their grievances. In the circumstances disclosed by the findings below, the question should be restated as follows:

Should this Court decide petitioners' claim for attorneys' fees where they chose to provide duplicative counsel who inappropriately attacked the adequacy of their union's representation before the arbitrator and then in an action to vacate an adverse award failed to establish a causal connection between the arbitrator's decision and their claim that the union's defense against their attack improperly influenced the arbitrator?

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IN THE

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OCTOBER TERM, 1986

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v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 406, KROGER COMPANY and HAMADY BROTHERS FOOD MARKETS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT TEAMSTERS LOCAL 406 BRIEF IN OPPOSITION

The respondent, Teamsters Local 406, respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's decision in this case. That decision is reported at 807 F.2d 493 (1986).

STATEMENT OF THE CASE

This is a "hybrid" § 301 and duty of fair representation action arising out of an arms-length lease/sale by The Kroger Company (Kroger) of its Kentwood, Michigan grocery warehouse to Hamady Brothers Food Mar-

kets, Inc. (Hamady), an unrelated supermarket chain based in Flint.[1] In 1980 Kroger began pulling its business operations out of western Michigan. As part of this withdrawal Kroger initially sold 21 of its 35 stores in the area to Hamady and later, on August 6, 1980, entered into a lease/purchase agreement to transfer the warehouse assets to Hamady. Kroger ceased operations at Kentwood on October 18, 1980. Hamady took over the warehouse two days later.

Before the transfer Kroger employed 199 warehouse and truck driver employees at the Kentwood warehouse covered by a collective bargaining agreement with International Brotherhood of Teamsters Local 406 (Local 406, Union) effective until October, 1982. Section 1.3 of that contract provided that "[t]his Agreement shall be binding not only upon the parties hereto but upon their successors and assigns." The agreement also established a four-step grievance procedure which was the exclusive mechanism for resolving disputes over the interpretation or application of the contract. The fourth step in the procedure was final and binding arbitration.

Hamady planned to continue operating the warehouse to supply the stores it had acquired but to reduce the level of operations and, consequently, the number of employees. Hamady hired approximately half, i.e. 99, of the Local 406 members employed by Kroger but refused to assume Kroger's collective bargaining agreement and did not hire in order of seniority. Because it hired virtually all of its Kentwood employees from the Kroger

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[1] Petitioners have not heeded sound advice to avoid argument and editorializing in stating the facts. Stern, et al. *Supreme Court Practice* 371-372 (6th ed. 1986). Polemics and diatribes may sway a jury but are no substitute for an "accurate . . . summar[y] of the relevant facts and the treatment accorded those facts by the courts below." *Id.* Except as noted, what follows consists of findings actually made by the district court and court of appeals in the decisions below.

work force, Hamady recognized Local 406 as their collective bargaining representative and on September 29, 1980 opened formal negotiations for a new contract. The Union agreed to bargain upon the advice of counsel by letter dated September 22 that Hamady was not bound by the Kroger agreement.[2] On November 22, 1980 a settlement was reached and ratified by the membership.[3]

Hamady had disclosed its decisions not to accept Kroger's labor agreement and not necesasrily to hire by seniority at meetings with the Union and the members on September 15 and 27, 1980. On September 23, 1980, Local 406 informed Kroger by letter that the Union would hold Kroger responsible for any damages to the employees if Hamady did not assume the collective bargaining agreement. In early October Local 406 and certain employees filed grievances alleging that Kroger's agreement was binding on Hamady and that its successors and assigns provisions compelled Kroger to make Hamady assume the contract. Kroger denied the grievances at the first two steps and on December 18, 1980 they were deadlocked at step three of the grievance procedure, which entitled Local 406 to have the issue resolved by an arbitrator appointed by the Federal Mediation and Conciliation Service. However, in a rehearing at step three Kroger succeeded in having the deadlock vacated and the grievances denied and then refused to arbitrate. Local 406 had abstained from the rehearing proceedings because they were not authorized by the contract.

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[2] Local 406 had to resolve the successorship question presented by Hamady's takeover at that time or risk committing an unfair labor practice by refusing to bargain. See *Little Rock Mailers' Union No. 89*, 219 N.L.R.B. 707, 710; *District 1199 E, National Union of Hospital & Health Care Employees*, 238 N.L.R.B. 9, 15.

[3] The agreement expressly preserved the Union's right to pursue the grievances against Kroger. *Kroger Co.*, 78 L.A. 569, 575 (Howlett, 1982).

This action, claiming breach of contract by Kroger and Hamady and breach of duty by Local 406, was commenced by three plaintiffs on October 16, 1980,[4] but plaintiffs' motion to enjoin the sale was denied. On February 11, 1981 Local 406 brought suit against Kroger to compel arbitration of the grievances, and the district court consolidated the two actions. On May 21, 1981 the court ordered Kroger and Hamady to arbitrate the grievances, Kroger's objection concerning procedural arbitrability to be determined first, and granted plaintiffs the opportunity to participate in the arbitration through a spokesperson of their own. The court did not find that Local 406 had violated its duty; it gave Local 406 principal responsibility for presenting the grievances and permitted intervention because plaintiffs appeared to have lost confidence in the Union's representation, particularly with respect to their claims against Hamady.

An experienced and respected arbitrator heard the arbitrability issues on September 2, 1981; he ruled in the Union's favor and held hearings on the merits on September 21, 22 and 23, 1981. Plaintiffs were represented by two attorneys who participated fully in the hearings, presenting witnesses and evidence, cross-examining the witnesses of other parties, and submitting briefs. On September 2 the arbitrator allowed plaintiffs to present evidence that Local 406 had violated its duty of fair representation by not pressing Hamady forcefully enough to employ high seniority Kroger workers. Union counsel objected to such testimony and, after the objection was overruled, cross-examined the witnesses who gave it. Plaintiffs also offered in evidence selected documents they filed in this action to support that claim. In rebuttal to maintain a proper balance, Union counsel presented and the arbitrator accepted Local 406's respon-

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[4] Later the complaint was amended to name 35 additional plaintiffs. Only one of the 38 plaintiffs was hired by Hamady.

sive submissions in this action. One of them was counsel's September 22 letter to his client that Hamady was probably not bound by Kroger's labor agreement and that Local 406's chances in arbitration against Kroger were about 50-50. Later the arbitrator declined to hear the unfair representation claims and, before the award issued, returned these exhibits, including the September 22 letter.

On January 8, 1982 the arbitrator issued an award denying all grievances, *Kroger Co.*, 78 L.A. 569 (Howlett). In an 82 page opinion which the Sixth Circuit termed "thorough and supported by the evidence", 807 F.2d at 501, the arbitrator concluded that Hamady was not a successor bound by Kroger's labor agreement under either federal or state law. He also concluded that under the contract language Kroger was not required to make Hamady assume the labor agreement as a condition of the transfer. This award was final and binding, in accordance with the collective bargaining agreement.

After the award issued plaintiffs moved to vacate the decision, alleging that the Union breached its duty during the hearings. The court denied motions by Local 406 and Kroger to strike plaintiffs' jury demand and for summary judgment. The court refused to grant class status to plaintiffs in part because of the possible conflict of interest between the ninety-nine who were hired by Hamady and the remainder who were not. The court also ruled that plaintiffs could recover damages from Local 406 in the form of their attorneys' fees if union breaches occurred during the arbitration proceedings even if plaintiffs did not prevail against the employer under the collective bargaining agreement.

The trial was bifurcated and the liability issues tried first. During the six week trial the only evidence plaintiffs offered from which a jury could infer that union breaches contributed to the erroneous outcome of the arbitration was expert testimony that a hypothetical ar-

bitrator might be influenced by signals from union counsel that the client did not want to win the case. The court refused to admit the arbitration award into evidence although it did permit testimony relating to it.

At the close of plaintiffs' case the court granted Hamady's motion to dismiss on the ground that Hamady was not a successor and obligated to assume Kroger's collective bargaining agreement. The court denied motions to dismiss by Local 406 and Kroger based upon the testimony of plaintiffs' expert and the trial court's view that the successors and assigns language was ambiguous, and hence that whether it required Kroger to sell subject to the contract was a question of fact for the jury.

At the close of the evidence the trial court instructed the jury that if it found that the Union breached its duty and that the breach undermined the arbitral process, it should determine whether Kroger breached the collective bargaining agreement. The instructions also permitted the jury to find that Local 406 breached its duty apart from the arbitration without determining that the breach was the but-for cause of plaintiffs' injury. Finally, the court's instructions failed to provide the jury with the definition of successor under federal law and to advise that Hamady had been dismissed because it was not a successor to Kroger. The jury found that Local 406 had breached its duty by its conduct apart from and by its action in the arbitration hearing with respect to both the claims against Hamady and those against Kroger. It also found that the Union's breach had undermined the arbitration process and that Kroger had breached its contract by failing to require that Hamady assume the agreement.

The district court denied motions by Local 406 and Kroger for judgment notwithstanding the verdict or for a new trial. The trial court later certified five questions for interlocutory appeal, and the court of appeals ac-

cepted the appeal. The five questions included whether plaintiffs were entitled to a jury trial, whether there could be any recovery for union conduct apart from the arbitration or regarding the claim against Hamady, and whether the jury was properly instructed regarding the arbitrator's decision. Plaintiffs' appeal from the dismissal of Hamady was consolidated with the appeals by Kroger and Local 406.

The court of appeals, applying this Court's holding in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 524 (1976), held that the arbitration award could not be vacated unless the union breached its duty in the arbitration and the breach tainted the arbitrator's decision, i.e. contributed to the erroneous outcome of the arbitration. It found no evidence from which the jury could find that the union's breach contributed to the erroneous outcome of the arbitration, assuming the outcome was erroneous. The court of appeals also held, based upon this Court's decision in *Hines* and other cases, that Local 406 was not liable to plaintiffs for any breaches during the arbitration because the arbitrator determined there was no wrong of the employer that resulted in their loss. With respect to union conduct apart from the arbitration the court of appeals held, in agreement with all other federal courts of appeal, that a union is not liable for breach of duty absent evidence that but for the union's conduct the employee would not have been injured, and ruled that in this case plaintiffs had presented no evidence to establish this causal connection.

Finally, the court of appeals denied plaintiffs' claim for attorneys fees for their counsel's services in the four day arbitration. It declined to follow the circuits that have granted recovery of damages in the form of attorneys' fees for breach of duty where plaintiff did not also prevail on the merits of the grievance because it was contrary to federal labor policy and against sound judicial policy. Such claims, it held, must be examined on a

case-by-case basis. Accordingly, the court of appeals reversed the district court's denial of the motions by Local 406 and Kroger for judgment notwithstanding the verdict and remanded with instructions to confirm the arbitration award.[5]

REASONS WHY THE PETITION SHOULD BE DENIED

There are no special and important reasons for granting the petition for writ of certiorari in this case as required by Rule 17 of this Court. Respondent Kroger's brief in opposition demonstrates why the holding below with respect to the arbitration award follows applicable decisions of this Court and does not conflict with the decision of any court of appeals. It also demonstrates why there is no reason for the Court to review the jury trial question in this case. Respondent Hamady's brief in opposition demonstrates why there is no reason for the Court to review the fact-intensive questions involving successor liability resolved in the decision below. Local 406's brief in opposition will address only the issue as to whether this Court should grant certiorari with respect to plaintiffs' claim for damages in the form of attorneys' fees for their counsel's services in the arbitration.

I. The Decision Below Raises No Issue Not Already Resolved By This Court.

The Sixth Circuit's refusal to permit plaintiffs to recover damages in the form of attorneys' fees from the union for their counsel's services in the arbitration rep-

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[5] In a separate concurrence one judge expressed full agreement with the court's analysis but thought the court should resolve the "important issue" of whether the right to a jury trial exists in hybrid actions of this kind. In his view duty of fair representation claims and the question of whether the award must be set aside must be decided by the court. Plaintiffs had a right to trial by jury only on their breach of contract claim. The court's opinion expressed "no disagreement" with this analysis but found it unnecessary to reach the jury trial issue.

resents an unexceptionable application of an established precept of this Court. This Court has ruled no less than three times in three key cases that plaintiffs cannot "prevail" against their union, let alone recover damages from it, unless they can also show that the employer violated the collective bargaining agreement.

> To prevail against either the company *or* the union, petitioners must show not only that their discharge was contrary to the contract but also carry the burden of demonstrating breach of duty by the union.[6]

The reason for permitting employees to recover damages such as attorneys' fees from the union in breach of duty of fair representation cases is that it is a measure of the extent by which the union's breach of duty adds to the difficulty and expense of collecting from the employer.

> Were it not for the union's failure to represent the employee fairly, the employer's breach "could [have been] remedied through the grievance process to the employee-plaintiff's benefit."[7]

Thus, because there was nothing plaintiffs were entitled to collect from Kroger, they cannot recover attorneys' fees or other damages from Local 406 for alleged breach of duty in the unsuccessful arbitration. For the same reason, plus another, they cannot recover damages for pursuing their claim against Hamady in the arbitration.[8]

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[6] *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 570 (emphasis added). *See also United Parcel Service v. Mitchell*, 451 U.S. 56, 62 (1981) and *Clayton v. United Automobile Workers*, 451 U.S. 679, 683 n.4 (1981).

[7] *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *cf. id.* at 236, n.6 [dissenting opinion].

[8] The arbitration against Hamady should never have taken place because the district court failed to determine prior to the arbitration that Hamady was contractually bound to arbitrate the grievance. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. ——, 106 S.Ct. 1415 (1986).

The court below correctly determined that a contrary rule permitting plaintiffs to recover their costs of litigation where they prove breach of duty but no underlying contractual right would violate sound judicial policy. It would encourage litigation in already overburdened courts and sap limited union treasuries with the cost of still more litigation by awarding attorneys' fees any time disgruntled employees can demonstrate a violation of duty in the grievance arbitration process even though the breach is harmless. Contrary to petitioners, deterrence of union misconduct has never been an absolute but merely one of several important considerations in the "careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area." [9]

II. No Conflict Among The Circuits Exists Which Should Be Resolved By Review Of The Decision Below.

Although the Sixth Circuit's opinion expresses disagreement with decisions from other circuits that are contrary to the clear pronouncements of this Court, those holdings do not conflict with the decision below. In *Del Casal* [10] attorneys' fees for counsel retained by the grievant to present his unsuccessful discharge grievance before an airline system board were recovered from the union because its breach consisted of denying him routinely supplied union counsel for discriminatory reasons. In *Dutrisac* [11] the union breached its duty when it missed

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[9] *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 45 (1979); *Vaca v. Sipes*, 386 U.S. 171 (1967).

[10] *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295 (5th Cir.), *cert. den.*, 454 U.S. 892 (1981).

[11] *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983). In rejecting the contention that the breach was not prejudicial the court of appeals reasoned that an arbitrator might have reached a different result or the employer might have offered to settle it before arbitration, *id.* at 1275, considerations that are obviously inapplicable here.

the time limit in appealing the plaintiff's discharge grievance to arbitration. The court sustained an award of $2000 in attorneys' fees for unsuccessfully litigating his discharge in the trial court because the union's breach deprived him of an arbitration that would have cost him nothing. The Ninth Circuit has now limited *Dutrisac* to cases where union misconduct is the "solitary and indivisible cause of the complete extinguishment of employees' grievance rights." [12] Thus in *Del Casal* the breach occurred before the arbitration and the award of attorneys fees measured the resulting loss. *Dutrisac*, too, is a case where the breach preceded the arbitration and could be remedied only by the employment of counsel.

Neither consideration applies in this case. The breach here for which attorneys fees are sought allegedly occurred during the arbitration hearings after plaintiffs retained counsel and chose to intervene in order to assist Local 406 counsel who under the court's order remained principally responsible for presenting the grievances. In short, unlike both *Del Casal* and *Dutrisac*, attorneys' fees are not recoverable here because they do not measure any loss caused by prior breach and because the alleged breach did not cause plaintiffs the complete loss of their grievance rights. On the facts found below, the Union's breaching conduct, i.e. expressing some doubt that the grievances could be won and taking an adversarial position *vis-a-vis* plaintiffs on the issue of the adequacy of the Union's efforts, would not warrant recovery of attorneys fees under the Fifth or the Ninth Circuit holdings.[13]

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[12] *Eichelberger v. Labor Board*, 765 F.2d 851 (9th Cir. 1985).

[13] No attorneys fees were awarded in *Stanton v. Delta Airlines, Inc.*, 669 F.2d 833 (1st Cir. 1982) and the court's discussion of *Del Casal* is pure dicta. 669 F.2d at 838. As its citations indicate, the Fourth Circuit's opinion in *Self v. Teamsters Local 61*, 620 F.2d 439 (4th Cir. 1980), like the *Del Casal* and *Stanton* opinion, confuse this Court's standards for determining liability with its formula for apportioning damages once liability has been established.

Moreover, no other court of appeals has awarded attorneys fees where alleged union misconduct was prompted by inappropriate and provocative conduct by plaintiff's representatives in the arbitration. The allegedly breaching conduct, which plaintiffs characterized as signalling the arbitrator that the Union did not desire to win the case, consisted of nothing more than Local 406 counsel's defense of his client from plaintiffs' attacks. On the findings below, 807 F.2d at 501, any contention that plaintiffs' counsel's participation in the arbitration was essential for a fair resolution of their complaint is blatant boot-strapping. Had plaintiffs not chosen to intervene in the arbitration or if their counsel had not injected evidence on an irrelevant and inflammatory issue at the arbitration hearings, the alleged misconduct would never have occurred. Because other circuits have not addressed claims for attorneys' fees in the context presented here, there is no actual or apparent conflict among the courts of appeal warranting review of the decision below.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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